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9

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF ADMIRALTY,

DURING THE TIME OF THE

RIGHT HON. LORD STOWELL.

BY JOHN HAGGARD, LL.D.,  
ADVOCATE.

EDITED BY GEORGE MINOT,  
COUNSELLOR AT LAW.

VOLUME I.

1822-1825.

VOL VII of Act

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TO THE  
RIGHT HONORABLE  
ROBERT LORD GIFFORD,  
BARON ST. LEONARD'S,

MASTER OF THE ROLLS, AND ONE OF HIS MAJESTY'S MOST HONORABLE  
PRIVY COUNCIL, ETC. ETC.

THESE REPORTS

ARE,

WITH HIS LORDSHIP'S PERMISSION,

MOST RESPECTFULLY INSCRIBED,

BY HIS OBLIGED AND OBEDIENT SERVANT,

JOHN HAGGARD.



JUDGE OF THE HIGH COURT OF ADMIRALTY,  
THE RIGHT HONORABLE LORD STOWELL.

KING'S ADVOCATE,  
SIR CHRISTOPHER ROBINSON.

ADVOCATE OF THE ADMIRALTY,  
JAMES HENRY ARNOLD, LL.D.

## ADVERTISEMENT.

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THE late editor of the Admiralty Reports, Dr. Dodson, having declined the continuance of them beyond an early period of the year 1822, the editor of the present volume has, with the approbation of the distinguished Judge of that Court, undertaken to communicate to the public a selection of cases that have since received its decision. Few of them are cases connected with the rights or duties of war : they are cases, generally, determined in what is called the Instance Court of Admiralty — that is, in its civil jurisdiction ; upon points of a general maritime and commercial nature ; such as present themselves to the adjudication of that court in times of peace, and which require its consideration upon principles of a maritime and commercial nature.

The editor, who employed himself in the publication of cases that occurred in the Consistory Court of London, during the time in which the same learned judge presided in that Ecclesiastical Court, has undertaken his present task in the hope that the communication of these judgments will be received with indulgence ; and will find a ready acceptance, not only among those members of the profession whose attention is frequently turned to questions of maritime jurisprudence, but likewise among many individuals of his own country, and perhaps among persons of a similar description in other countries, who are intimately engaged in maritime and commercial concerns.

The editor avails himself of this opportunity to acknowledge the kind assistance with which he has been encouraged by the illustrious Judge himself, as well as by the brethren of his profession ; — which he hopes will be considered as a guaranty of the general accuracy of the following pages.

DOCTORS COMMONS, October 11th, 1825.



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REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF ADMIRALTY.

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TARTAR, Tharp.

March 15, 1822.

A bottomry-bond given by a master to the foreign merchant who appointed him, "binding the owners of the ship," and indorsed "as a collateral security for bills of exchange," pronounced valid. The Court of Admiralty does not hold, that a bond bad in one part vitiates the rest. A foreign agent upon whom the entire management of a ship devolves, under circumstances of great distress, and who acts with *bond fide* intentions in her concerns, is entitled to be equitably supported.

*Semble*, that a charter-party may be avoided by an act of the ship-owner.

Partial disallowances — no impeachment of a previous title to costs.

THIS was a cause of bottomry promoted by Messrs. Atkins & Son of London, merchants, the agents of the bond-holder, against the above-named ship, and her freight. An appearance was given to the action for Mr. Alexander Robertson, the principal owner of the said ship.

The act on petition,<sup>1</sup> in substance, stated, that this ship being at Port Maria, in the island of Jamaica, was obliged to undergo some repairs before she proceeded on her voyage to London; that the master being unable to pay for them, and for provisions and other necessities for the ship, applied to Mr. Hubbard to advance him money for that purpose, which he (Hubbard) accordingly did on a bond of hypothecation, bearing date the 31st January, 1820, to the amount of 756*l.* being at the rate of 120*l.* for every 100*l.* advanced. On the 11th of May following, the ship

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<sup>1</sup> An act on petition, as it is technically called, "is a summary mode of proceeding, in which the parties state their respective cases briefly, and support their statements by affidavit." Per Lord Stowell, in *The Ville de Varsovie*, 2 Dodson, 184.



arrived safely in this country with her cargo. It was alleged on the other side, that, in October, 1818, the ship was chartered to carry passengers to a port of discharge in or near the river Oronoko, in South America, from thence, with a cargo, to London or to some port in the West Indies, and finally to carry from such port, or from one other port in the West Indies, a cargo of lawful merchandise to London; upon a consideration of 2,100*l.* by the lump, as the whole freight, part to be paid on the completion of the outward voyage, and the remaining part on delivery of the homeward cargo, in the customary manner. The ship landed her passengers at Angostura, in the Oronoko, early in January 1819; not meeting with a cargo there, the agents of the charterers directed the captain to proceed to any of the West India islands at his discretion; in consequence of this he went to Tobago, but not procuring a cargo, he proceeded to Port Maria in Jamaica, where he arrived on the 5th of March. That the then master being very ill, he put the ship into the hands of Hubbard, a merchant residing at that port, to take charge of her, and procure a cargo, adhering to the spirit of the instructions, which would be found among his papers at his death, which event occurred on the 10th of March; that Hubbard took possession of the vessel, appointed Tharp as master, and wrote various letters to the owners, in which he referred to the charter-party; that he gave them false accounts

[ \* 3 ] of the \* disbursements, twice drew bills upon them for money on account of the ship which were duly paid, and in the following month of June, in contradiction of the charter-party on board, and without any authority from the owners, and to their great loss, he chartered the vessel to go to Bermuda, and from thence with a cargo back to Port Maria, where she again arrived in September; that in February, 1820, she sailed for England with about two thirds of a cargo, but was so insufficiently provided, that she was obliged to put into Fayal, for provisions. In reply, it was alleged, that the appointment of the master was under the authority granted to Hubbard, "to act generally for the benefit of the ship and the interest of her owners," and that such appointment was confirmed and approved of by them in a letter dated 6th of May, 1819; that the two bills of exchange were of very trifling amount, being for a few necessities furnished to the ship. It was further averred, that the difficulty of speedily procuring a freight for the ship, arose, in a great measure, from her age and class, and that the employment of her in the interval was for the advantage, and with the knowledge, of the owners; that on her quitting Port Maria for England, three fourths of a cargo was all that could be procured, and the protraction of her voyage was owing to the heavy gales of wind she encountered; that there was no person either at

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The *Tartar*. 1 Hagg.

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Port Maria or at Kingston who would advance any money on the security of the bills of exchange which Tharp drew upon Robertson & Co., and therefore he was under the necessity of granting the bottomry bond.

\* The court called upon the counsel for the owners to show [ \* 4 ] their case. For the owners, *Lushington* and *Dodson*. One of the peculiar features of this bottomry bond is, that it was not granted while the ship was proceeding on her general voyage. The voyage to Bermuda was disapproved of by the owners as soon as it was known to them, and it was contrary to the particular stipulations of the charter-party which was on board. If Hubbard had read the charter-party, he would have ascertained that this voyage was prejudicial to the owners; and we shall show that the money was advanced for the benefit of the charterers alone. The money was lent on the property of the owners, but not for the benefit of the owners. It is not competent for any merchant advancing money on bottomry for the purpose of carrying into effect a new voyage, to enforce that bond in this court; such a bond may be suable in Courts of Common Law and Equity, but not here. Bonds that are suable here, are only those given from necessity, for the purposes of navigation, and to further the completion of a voyage. The owners could derive no benefit from the employment of their vessel; they had let her for a specific sum, and would not be entitled to an additional freight in case of a further voyage. It was no matter to them, whether she carried passengers or not, whether she earned freight or not; but it was their interest to get the ship home as soon as possible, while that of the charterers was to get as much freight as possible. Upon the death of Captain Hutton, the conduct of the ship, by his appointment, devolved upon Hubbard. He succeeded \* to the obligations of the former captain, and though [ \* 5 ] it is clearly established that a master of a ship is invested with every power for the fair performance of a voyage, he cannot exceed that power. *Holt's Shipping and Navigation Laws*, pp. 217, 218.<sup>1</sup> And a captain with a charter-party on board must act conformably to it. Now, the first letter from Robertson & Co., to Hubbard, dated 6th May, 1819, contains this passage: "We shall be very singularly obliged by your procuring a quick loading for *The Tartar*." Not the loading, but the quick loading, is the mode of expression. This was in order that the ship might arrive prior to the expiration of the insurances, and agreeably to the terms of the charter-party. Again, in a letter of the 8th of June, "We presume you will have

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<sup>1</sup> 2d Edition.

perused the charter-party, and you will no doubt be aware that the ship has a lump sum for the round, and that the merchants take the risk upon themselves of procuring freight home, and are bound to furnish her with a cargo alongside; we hope you have kept this in view, as it will be attended with considerable expense, and we request that an account may be kept, that no charge incurred in this way may be set against the owners." Yet H. detains the vessel at Port Maria, between nine and ten months, and charges to the owners the expense of an agent to go to Cuba, in search of a cargo of wood, which he does not procure; he then enters into a by charter-party to go to Bermuda, a discretion that might have been laudably exercised, [ \* 6 ] in the absence of any charter-party on board, but while \* that was in existence, he could not go beyond entering into one subsidiary to the first.

[COURT. I perceive that Captain Hutton had a general authority from the owners to sell the ship, if he should think it for the benefit of the owners. How do you reconcile that with the charter-party? Were the charterers to be a party to this transaction? The charter-party might thus be avoided by the representative of the owner alone.]

It might have been for the interest of both parties, to have sold the ship at Angostura; and we are informed that, at the time the charter-party was agreed upon, the charterers suggested that they might possibly give the owners an opportunity of making an advantageous sale to the Venezuelan government, and it was understood that the consent of the agents of the charterers was to be first obtained, who would have had no hesitation in cancelling an agreement, if a purchaser had offered, when they were unable to procure any freight at that port; but we submit, that this permission is only given on a slip of paper, which cannot overrule a regularly executed contract.

[COURT. No matter whether *folio* or not; it entitled the master to act. The explanation offered to the court is verbal. I must have it proved. The paper comes from Robertson & Co., the owners of the ship, and must be verified by them upon oath. They must have known of its existence; it is not incorporated with the charter-party, but it stands separate. The solution of it may go home to the whole question. The document releases the ship from the obligation of the charter-party, as it gives the master a discretion to sell the [ \* 7 ] ship abroad, and so prevent its \* final return to England.<sup>1</sup>]

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<sup>1</sup> Before the court delivered its judgment, Mr. Robertson confirmed, upon affidavit, the statement of his counsel. It appeared, however, that a power of sale was given

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The *Tartar*. 1 Hagg.

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We certainly admit that a master, appointed by a lawful agent abroad, may give a valid bottomry bond; but we deny that the money was, in this case advanced upon bottomry; the bond was given ultimately, just before the ship sailed, and it is not mentioned in the course of Hubbard's correspondence with the owners. The bond itself, too, is of a peculiar description; it is made in the name of the master, and binds himself, his heirs, &c., &c., (much in the customary form,) and also "the owners of the said ship," but for which he had no authority whatever.<sup>1</sup> Then follow the conditions of the bond, and it is indorsed, "An instrument to be considered as a collateral security for bills of exchange drawn by Captain Tharp, which bills being duly honored, this bond is to be cancelled, and of no effect." It is therefore manifest, that this bond was given as a security to the bills, and is invalid under the authority of *The Augusta, De Bluhn*,<sup>2</sup> for it is proved that here two bills were drawn, and both were honored; and that the advances were clearly made, not on the security of the bond, but upon the personal credit of the owners, and for the balance of a general account.

\* For the bond-holder, *Barnaby and Jenner*. The charter- [ \* 8 ] party was at an end when this transaction took place; so that we shall reduce this question to one of an ordinary bottomry bond. It was covenanted, "that 100 running days were to be allotted for loading the ship in the River Thames, discharging in the Oronoko, reloading there, and delivering in the West Indies, and there reloading, with an option of keeping the ship twenty days more, at 7*l. per diem*." Now the lay-days expired on the 9th of June, 1819, and the letters show that Robertson & Co. had knowledge of this circumstance; in addition to which, they had directed the homeward cargo to be consigned to them, as soon as the charterers had refused to honor the bill due for the outward freight.

On the termination of the lay-days, what demand could the freighters have upon the ship? the whole freight then became due, and the charter-party was extinct; it was concluded as against the charterers, insomuch that the master could no longer be obliged to wait at the foreign port, but might instantly have sailed for England,

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without any other qualification than what referred to the price of the ship; so that, it was observed, whatever might be the meaning of an explanation between R. & Co., and the original captain, it did not alter the case with respect to Hubbard, to whom it could not be supposed to be known.

<sup>1</sup> See Abbott on Shipping, p. 186, ed. 1808.

<sup>2</sup> 1 Dodson, 286.

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The Tartar. 1 Hagg.

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or have taken in a cargo of his own. *Randall v. Lynch*, 12 East, 179; *Puller v. Halliday*, *Ib.* 494.

[COURT. At the expiration of the lay-days, Hubbard ceased to act as agent for the charterers.]

It has been said that we are attempting to introduce a novel principle into these courts, with regard to bottomry-bonds on a new voyage; but we reply, that no question of that kind presents itself in this case; for it is proved, that the voyage to Bermuda, and all the expenses incidental to it were paid on the freight of that

[ \* 9 ] voyage. \* The items in the account current have no reference to that voyage; and the bond was given for necessary expenses prior to the ship's sailing for England. As to any incompetency in the master to grant it, we prove by the letters of R. & Co., that both prior to the sailing of the ship to Bermuda, and after the return to Port Maria, he was acting with the acquiescence and concurrence of that house; they never at that time thought of taking such an objection; they recognized his transactions, and expected a remittance from the freight, so that it is not for them now to complain; for though the ship may have been unfortunate, the *bona fides* of the agent and the master cannot be impeached; and their conduct will be viewed by the court with great latitude and liberal interpretation. The party disputing our demand has set up a most unjust defence, for besides the balance due on the Bermuda freight, a sum, nearly 1800*l.* has been earned upon the homeward cargo, to which the owners are entitled; for it was consigned to them, and they have not received it. This freight then arises from the benefit of the expenses incurred, for which this bond was given. If any explanation of the accounts is required, it may be given to the registrar and merchants, who will fully investigate them. But we submit that the court is perfectly competent to entertain the question of this bottomry bond; its decision will put the question at rest. They cited

[ \* 10 ] the case of *The Jane, Birkley*,<sup>1</sup> to show, that \*granting bills of exchange at the same time with a bottomry bond did not vitiate the bond.

#### JUDGMENT.

LORD STOWELL. I do not feel that my mind is impressed with any valid objection to this bond; and I think that the arguments that have been urged against its validity, are met by a fair consideration of the circumstances of the case. This ship, destitute of all stores,

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<sup>1</sup> 1 Dodson, 466.

and with only one man of the original crew alive, for the mate was, at the express desire of Captain Hutton, discharged, comes to Port Maria in such a distressed state, that if a man should sit down to consider of a fit subject for bottomry, this would be it. She comes to Mr. Hubbard, a person who is a total stranger to every one connected with her; a merchant of fair and honest mercantile reputation, (for nothing is shown to the contrary,) who is charged by the master with the management of this ship, and of his own little concerns. The master dies on the day after he had made this application to Hubbard, who it does not appear, was in the least solicitous to obtain the care of this vessel, and from which he would naturally rather have wished to withdraw himself; for he knows nothing of the captain nor of the owners; he is in total ignorance of their responsibility; so that it is highly improbable that he would depend upon their personal credit, (of which I repeat he knew nothing,) and advance money to a large extent, upon any less security than what the law has characterized by the name of bottomry. If credit of this description were not allowed, ships in the distress that this vessel is represented to have been, must become a kind of derelict, and \*left to [ \* 11 ] any one who might happen to get possession of her, either by force or by fraud. A man, therefore, sets out with great claims of desert and of merit, who promptly undertakes to interfere in such a case, and where considerable expenses cannot fail to be contemplated.

The voyage turned out a vexatious business, and the owners themselves, as is evident from their correspondence, did not contemplate the adventure with any self-congratulation; they expected a very losing concern. If, however, the merchant in this case acted *bonâ fide*; if he pursued the original plan of the ship as much as possible, though circumstances turned out more unfavorably than could be expected, still he is to be supported, unless it can be shown that he absolutely acted contrary to orders. If it should happen that there are any unfair charges, they are to be referred to the registrar and merchants, and they will be reduced; but it is the privilege of an agent, constituted in the manner that Hubbard was, to whom the vessel is recommended by a dying captain, to have his conduct interpreted liberally. It is to be interpreted by the necessities of the case. What, then, does he attempt to do? He tries his ground in a variety of quarters to get a cargo home—a step that no one can blame, and to which he is much encouraged by those who are concerned in this country. He is foiled, however, in his attempts by other vessels coming to the same port, and being ready to take cargoes on board; but he is foiled more particularly by the character of inefficiency which attached to



this very ship, which, not standing so high at Lloyd's, was [ \* 12 ] postponed to its competitors. The man, however, \* acts for the best, and I do not know what he could do better; nor have the counsel for the owners been able to assist me by any practicable suggestions of their own; so that I am not disposed to hold that, under such circumstances, he was bound to the mere authority of an ordinary master. I think he was bound to what an honorable and *bonâ fide* intention would hold him to, under such a state of things; and if he acted up to such an intention, it is sufficient.

It cannot be said that the ship was to remain in harbor, eating her head off, as the vulgar expression is;—for whose benefit would that be? That would be of no advantage to any one. But it is argued that Hubbard should have sent the ship home. There was, however, no obligation on him to find the necessary stores, and defray the other expenses of her homeward voyage. In my opinion, he attended to the charter-party *cy-pres* as he could; and there was a great deal that might have led him to the conclusion that the charter-party did allow of the latitude he ascribed to it. There was a power to sell the ship, which now, indeed, is explained; but this man was no party to these understandings between the owners and the original captain. The captain dies, and, dying, consigns every thing to Hubbard, and recommends him “to act according to the spirit of his instructions, and to use his own judgment either to send the ship for mahogany, or on any other voyage which may prove advantageous to the owners.” This gives a great latitude and a large discretion, which is to be regulated by the circumstances of the case. Upon the emergency of these circumstances he acts. The ship was not in a fit state to

[ \* 13 ] come to \* London, and a cargo was in vain sought for, till an advantageous trip offers to Bermuda, which was accepted, and by which a freight was earned. I am inclined to think that the charter-party at this time was extinct; but even supposing that it was not, what is the deviation from it? The ship wanted, at this period, new hands and new stores; she wanted repairs, and every thing necessary to enable her to sail; and was Hubbard bound to supply all these things, and to send the ship to London? She was repaired even to go to Bermuda, and would have taken much more to have come to London. He had a right, then, to take all the security the law would give him; but he does not think it necessary to avail himself of this privilege to its fullest extent in the first instance; he is contented with the personal security of the owners for the small advances which he makes to fit the ship for her voyage to Bermuda; but upon her return he ceases to place the same confidence in the same security, when he is called upon to make more important dis-

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The Tartar. 1 Hagg.

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bursements in her service. Many of the observations that were addressed to the court may apply to the first advances, but they, in no way whatever, relate to the present balance. It therefore appears to me that this bond was not given for the new and intermediate voyage, but was resorted to for the purpose of enabling this ship to complete her voyage to London, by which freight might be earned, and was earned.

It has, however, been contended that the bond is void, because the owners are in terms described to be bound by it; and I apprehend that the owners are always bound to a certain extent of their property in the ship. But this court, proceeding on principles of general equity, does not hold that a bottomry bond, bad in one part, necessarily vitiates the rest.<sup>1</sup> It may be invalidated by a case of fraud, and by the ill conduct of the party; and if such a charge could be established, then, indeed, this bond would share the fate of the other unprofitable transactions connected with this vessel; but, I repeat, I never saw a case in which a man stood upon higher ground in taking a bottomry bond. In saying this, the court does not confine itself to minute particulars. It does not go to justify all the charges, for they may be the subject of reference to the registrar, properly assisted in the usual way. If, upon the whole of these circumstances, I have taken a false impression of this case, it is subject to a superior revision; but I have a strong impression that this bond is good, and I pronounce for it.

The court referred the accounts and charges to the registrar and merchants, to ascertain and report the amount due under the bond, and reserved the consideration of costs.

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On the 11th of December, counsel were heard upon the report, when some objections were made to the disallowances of a commission of five per cent. on the balance of the account, and of a premium of twelve and a half per cent. on the bills of exchange. These objections were overruled, and the report was confirmed.

\* Upon the reserved question of costs, —

[ \* 15 ]

**LORD STOWELL.** In this unfortunate case, the court suspended its judgment merely on the point of costs. When the validity of the bond was argued, the court was of opinion that it was a case in

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<sup>1</sup> See *The Gratitude*, *Mazzola*, 3 Rob. 271; *Augusta*, *De Bluhn*, 1 Dod. 288; *The Hero*, *Howard*, 2 D. 147; and *The Nelson*, *Brown*, *infra*.

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The *Augusta*, or *Eugenie*. 1 Hagg.

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which the party had acted most meritoriously. The ship was in a most deserted state; and if Mr. Hubbard had not acted as he did, and taken it under his direction, it must have been a total derelict. If it proved an unfortunate transaction, I must relieve him from all charge of misconduct; he did the best that could be done for the common interest of all parties. The registrar and merchants have not disclaimed any of the disbursements charged in his account. His conduct is, therefore, as justifiable in the latter part, as it was in the former part of the transaction; and I am bound to do what I strongly signified I should do, that if nothing of fraud was proved against him, I should give costs. The court thought it was an unjust and very ungracious opposition that was made to this bond, and, on that ground, I do give costs. The original conduct of the bottomry bondholder is entitled to a claim of merit, and his subsequent conduct has not impeached it. The charges that the registrar has disallowed do not give a character of fraud to any part of this transaction. The title of the party, therefore, to his costs, upon the general proceedings, is not vitiated; but I shall make no order as to those which may have been incurred by the discussion of the registrar's report. It was fairly brought to my notice, and the opposition to it has not imported a great expense into the case; because, on the matter of costs, the parties must have come before the court.

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[ \* 16 ]

\* *AUGUSTA*, or *EUGENIE*, Louvel.

March 19, 1822.

Wreck. Royal and manorial franchises considered with reference to that subject.

THIS French vessel, laden with a cargo consisting of 133 casks of wine, and seventeen casks of brandy, and other stores, while in the prosecution of her voyage from Bourdeaux to Boulogne, was on the 7th December, 1820, stranded within the manor of Rottingdean, in the county of Sussex. Mr. Beard, who acted as the reeve of the Earl of Abergavenny, the lord of the manor, took possession of the wreck, and deposited the cargo in his own warehouses, but under the control of the officers of the customs and excise. A claim having been given and withdrawn on the part of the crown, the ship and cargo were arrested at the instance of the reeve in a cause of salvage; an appearance was entered for the owners and for the lord of the

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The *Augusta*, or *Eugenie*. 1 Hagg.

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manor, and the respective claims were set forth in an act on petition.

For the reeve, *Phillimore*. There is no dispute as to the jurisdiction. The question is, whether salvage is due to the reeve, who was the actual salvor, or to the lord of the manor, whose rights as grantee of the crown are not disputed; but we contend that his rights extend only, in these cases, to unclaimed property. (*Aquila*, Lunsden, 1 Rob. 37.) The lord of the manor has incurred no expenses, and we deny that he can have any claim to salvage, inasmuch as salvage is a reward for personal service.

For the owners, *J. Addams*. The property has been restored to the owners, subject to a payment \* of such salvage [ \* 17 ] as the court may award. They have, therefore, no interest in the discussion of the rights of the other parties, and pray to be indemnified from the expenses so brought upon them.

For the lord of the manor, *Lushington* referred to the 1 & 2 Geo. 4, c. 75, s. 25. He contended that, as grantee of the crown, the Earl of Abergavenny has the custody of all wrecks which may be thrown upon the coast within the manor of Rottingdean. He has a right of possession till the property is lawfully claimed; this is so by the laws of Oleron, which, in these matters, may be regarded as the law of the land.<sup>1</sup> Upon the restitution of the property, the lord is entitled to a salvage remuneration for putting it into a state to be restored, and for his general responsibility. The agent took possession as the reeve of \* the lord of the manor, and according to his [ \* 18 ]

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<sup>1</sup> The laws of Oleron, says Blackstone, "are received by all nations in Europe as the ground and substruction of all their marine constitutions." Commentaries, vol. i., p. 419, Coleridge's edition. The learned editor notices the controversy in which various writers have been engaged relative to the origin and date of these celebrated laws. (n. 7.)

The laws of Oleron, s. 30, require the lord to save what he can, and to make distribution among the relations of those who have perished, and among the salvors; he is to keep the rest for the owners for a year, and then sell, and give the money to the poor, and to marry poor maids, and to do other charitable works, according to reason and good conscience.

Much valuable information with regard to the law of Scotland, upon the subject of wreck, as connected with royal and manorial privileges, may be found in the printed papers of the case of *M'Dowall v. M'Dowall*, House of Lords, 1825. The cause was argued by Dr. Lushington and Mr. Keay, for the appellant; and by Dr. Jenner and Mr. Abercromby, for the respondent; when the sentence appealed from was affirmed, upon the motion of Lord Gifford, with 100*l. nomine expensarum*.

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The *Augusta*, or *Eugenie*. 1 Hagg.

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own affidavit, he looked to him in case any loss or expense was incurred: if, then, he should be entitled to any reward, he should receive it through his principal.

#### JUDGMENT.

LORD STOWELL. This cause has been depending a much longer time than its importance deserves, and therefore I shall be glad to extinguish it. It has been described as a case of maritime salvage, but it can hardly be so considered. The vessel is stranded upon the coast; when she is found, the tide had left her, so that any one could walk round the hulk without a wet foot; and I really do not see what the reeve, who is claiming a salvage remuneration, has done more than was done by other persons who took care of the vessel, which was speedily put under the care of the officers of the customs and excise.

Undoubtedly no one would be more ready at any time than I should be, to protect the rights of a nobleman who is the representative of so ancient and illustrious a family as that of my Lord Abergavenny; and the court is now required to protect him as the possessor of certain manorial rights and privileges which have descended to him from his ancestors; but the present case is not one in which they are affected; it being merely a question, on Lord Abergavenny's part, as to the conduct of his reeve. We know very well, that, by the ancient common law, all property stranded belongs to the king: after a year and a day it belongs to him entirely; [ \* 19 ] and during that time it is vested in him for protection until the owner can be found. In many cases, lords of manors are grantees of the crown, of those royalties and privileges which may be established by the grants themselves, or by immemorial custom; but the grantees cannot stand on higher ground than the king, nor can their grants avail against the general principle of law to which I have adverted.

Lord Abergavenny's reeve takes possession of this wreck; and the real question for the court, on this part of the case, is,—in what capacity he takes it, whether in his own capacity and on his own responsibility, or as the representative of the noble lord under whose authority he is contended to have acted? And I think it is clear that he took possession by virtue of his authority as reeve, and not in his own title and capacity. There seems evidence enough to show that he looked to Lord Abergavenny as his principal; but it rather appears to me that the reeve is willing to take advantage of both characters—to appear in his own personal character in the case of eventual benefit, and as the agent of his lord in the case of any eventual loss.

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The Augusta, or Eugenie. 1 Hagg.

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I do not, however, see, that any loss has been actually incurred for which either one, or the other party, can be responsible. Losses might have been incurred unquestionably, and they might have fallen upon Lord Abergavenny; and, supposing that they had, he might have found much difficulty in discharging himself from any liability that could have been fixed upon him, by any action against others: for these ancient rights, which were originally conferred as marks of favor or distinction, are not at this day considered as of much advantage and \*emolument: they are honorable pri- [ \*20 ] vileges, but often burdensome in their character.

I have already observed, that property of the description of wreck, may by the general law be acquired beneficially for the crown. It is therefore very properly, in the first instance, placed in the custody of the admiralty: the proctor of the admiralty interposes for its protection, until a claim is given; but as soon as a lawful owner appears, he withdraws his claim, as he did in this particular case; the right of the crown to the property is then gone; the ship and goods are restored, and the charges of the admiralty are paid. The disbursements of the officers of the crown are made for the preservation of the property; when that is claimed, they are entitled to be indemnified.

The rights of Lord Abergavenny appear to stand very much on the same footing as those of the crown, from which they are derived. As grantee, he is empowered to take possession of property wrecked within the manor, but only till a claim is made. When a claim is given with a reasonable prospect of proof, his right of custody ceases, and he has no further interest in the property. Here the reeve takes possession, in my opinion, as the lord's deputy; and he deposits the property in his own warehouse; but he has not an exclusive possession, for the officers of the customs and excise interpose, and affix their locks to the doors. Some allowance, however, a moderate one certainly, should be made to him, and he must be repaid whatever he has fairly expended; and the court would gladly have been informed how far his expectations go upon this occasion: my own notions of remuneration do not rise to any extravagant height, for \* I see no very extraordinary merits in the case. [ \*21 ] It cannot be worth while to trouble Lord Abergavenny, for the preservation of his rights, with any apportionment of the reward that the court proposes to give, in lieu of salvage, to the reeve, for it is in that character that I regard him to have acted in the greater part of this business, and not in his own personal character. The court desires to be understood as not infringing upon the rights of Lord Abergavenny; it merely wishes to put a stop to proceedings



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The *Harregaard*. 1 Hagg.

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which may now well be dismissed without the incurring of further expense. I am therefore willing to allow the reeve, exclusive of his expenses, something of a gratuity — salvage I can hardly call it, for it cannot strictly be considered as a salvage case; but I will give him the sum of 100*l*.

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The court decreed the sum of 100*l*. to be paid to the reeve for his services to the ship and cargo, (but without prejudice to the rights of the lord of the manor,) and condemned the ship and cargo in the said sum, and in the expenses of both parties; and moreover decreed so much of the cargo as will suffice to defray the proportion of the said sum of 100*l*. and the expenses on all sides chargeable on the cargo, to be sold duty free, pursuant to the provisions of 1 & 2 Geo. 4, c. 75, s. 38; and referred the said expenses to the registrar and merchants to report thereon. On the 24th of April the report was brought in and confirmed; when the judge, upon the petition of the proctor for the reeve, directed a commission to issue for the purpose of selling so much of the cargo as will defray the amount of the said report, together with such other charges as may attend the sale thereof; such sale to be made with the concurrence and under the authority of the commissioners of the customs and excise: and with consent of all parties, ordered the commission of sale to be directed to the claimant of the ship and cargo.

On the 8th of August, the proctor for the owners alleged, that in virtue of [ \* 22 ] the commission sundry parts of the cargo had \* been sold duty free, to defray the amount of salvage and expenses, but that subsequent to the report of the registrar, other charges and expenses had been incurred, as also the expenses of the sale. The surrogate referred them to the registrar and merchants for a further report; and no objection was made.<sup>1</sup>

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## PRIZE COURT.

HARREGAARD, Peterson.

April 30, 1822.

Rate of brokerage upon the sale of prize goods generally. The same commission allowed to a broker, under the particular circumstances of the case, upon the sale of prize goods under the direction of the East India Company.

THIS Danish East Indiaman, whilst on her return voyage from Tranquebar and Bengal to Copenhagen, laden with a cargo of indigo, sugar, and tea, was captured, in February, 1808, by H. M.'s ship *Otter*, and carried to the Cape of Good Hope, where, in the fol-

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<sup>1</sup> See *infra*, The *Jonge Nicolaus*, Parma. Also 6 Geo. IV., c. 107, ss. 47, 48.

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The *Harregaard*. 1 Hagg.

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lowing month, the same were condemned as good and lawful prize. Mr. Bird, the agent for the captors, consigned the ship and part of her cargo to Wheeler & Farnworth of London, merchants, and substituted them as agents. Under their directions a sale of the ship and goods was effected by Smith, Marten & Co., brokers, who paid over the balance of the proceeds, (being upwards of 14,000*l.*.) to their employers.

On the 15th of December, 1817, the admiralty proctor, on behalf of the treasurer of the navy,<sup>1</sup> obtained a monition [ \* 23 ] against the agent,<sup>2</sup> and substituted agents,<sup>3</sup> to bring in the account of the sale of the ship and cargo, and the balance of the proceeds undistributed. On the 18th of April, 1820, the papers and accounts were referred to the registrar and merchants. On the 18th of June, the registrar brought in the report, by which it appeared that the sum of 80*l.* 10*s.* 3*d.*, being one moiety of the sum charged by Smith, Marten & Co. for brokerage, was disallowed. In February, 1821, at the petition of the substituted agents, a monition issued against Smith, Marten & Co., for the payment of that sum : they appeared, and prayed to \* be heard in objection, and [ \* 24 ] the case now came before the court in an act on petition.

For the brokers, *Lushington* and *Dodson*. There are two questions for the consideration of the court : First, whether Smith, Marten & Co. have been rightly called upon in this case. Secondly, whether the brokerage ought to be 1*l.* per cent. or 10*s.* per cent. The original charge of 1*l.* per cent. was never objected to when the accounts were rendered ; it was acquiesced in by the agents, and, as far

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<sup>1</sup> See 54 Geo. III, c. 93, s. 11.

<sup>2</sup> On the 2d May, 1820, the judge pronounced Bird, the agent, to be in contempt, by reason of his not having made any satisfactory return to the monition, and decreed him to be attached ; but ordered the attachment to be directed to the Judge of the Vice-Admiralty Court at the Cape, with a special instruction that it should not be enforced until the expiration of three months from its arrival ; but to be then executed, unless it shall appear to him that the said monition has been obeyed by a remittance of the undistributed proceeds to Great Britain, as thereby directed, or unless a satisfactory explanation shall be made why it has not been complied with.

In *The Juno*, Bates, (July 9th, 1822.) an attachment in similar terms was decreed. On May 7th, 1822, in the case of *The Isle of France*, Lushington moved, that the attachment, under which Mr. Ried had been confined in the Tolbooth at the Cape of Good Hope for five years, should be superseded. — Ordered.

<sup>3</sup> In the case of the *La Felicité*, captured in 1808, a question was raised as to the liability of a substituted prize agent, when the court held that he was not liable, and dismissed him and the assignees of his estate from the monition ; as it had done in a former case of *The Emily*, Peacock, where the same parties were concerned.

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The Harregaard. 1 Hagg.

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as appears, by the captors, for twelve years. If the agents allowed any exorbitant charge, the process of the court ought to be directed against them. It is true, the court has the power of proceeding against any individual who may have retained prize property, however remotely concerned, but this, however, must be exercised within some circumscribed bounds; for if it were carried to an extreme length, it might involve the court in the discussion of suits against warehousemen and carriers. The time that has elapsed is of the greatest importance in the consideration of this question, for, from the omission of these agents to settle their accounts, twelve years is allowed to pass away before a monition issues against the brokers to refund the trifling sum of 84*l.* 10*s.* 3*d.* The firm of the brokers is now altered; it is no longer composed of the same individuals; and their accounts have long since been wound up and adjusted. We advert to these grounds of inconvenience, but we can resist the demand on principle. By 46 Geo. III., c. 113, all goods coming from the East Indies

are regularly vested in the warehouses of the East India [ \* 25 ] Company, and are sold at their sales; and it is alleged \* on the other side, that 10*s.* per cent. is the ordinary sum paid to brokers who are employed at these sales, and is a sufficient compensation; though it is admitted that 1*l.* per cent. is due on the sale of the ship, and on all prize goods generally. The exception is grounded on this assertion, that the company charge 3*l.* per cent. for warehouse room, and in satisfaction of other demands; besides 10*s.* for collecting and paying over the proceeds. But this statement is not supported by any evidence whatever; and there is nothing to show that, in the opinion of any one, the sum of 10*s.* is considered a fair *quantum meruit*, excepting the report of the registrar and merchants: while, on the part of the brokers, it is distinctly proved by affidavits from three of the most respectable houses in London, that 1*l.* per cent. has been invariably allowed, upon the sale of all prize property, from 1793 to 1815; and a larger rate when the sales are effected in any of the outports. The same charge has always been allowed in the accounts of the commissioners appointed for the custody of prizes taken before a declaration of war, as also by agents of captors for captures subsequent to such declaration; and this without any distinction as to East India Company's sales. The unimpeached continuance of this practice for twenty-two years is alone strong proof in favor of its justice: for some agent or captor would have impugned it, if it were so exorbitantly unjust as it is stated to be. By a sale at the East India House the trouble and care of the brokers may be varied, but they are not lessened; and there is a broad distinction, which has not been adverted to in this case, be-

Harregard. 1 Hagg.

tween all prize sales \* and common peace sales. In prize [ \* 26 ] sales, the duties which fall upon the merchant in ordinary transactions are imposed upon the broker; the merchant only employs a broker for the actual sale. The merchant watches the time and opportunity of sale, and thus divides the labor with the broker, so that 10s. may then be a sufficient remuneration. But it is otherwise with prize sales; there the consignor looks to his broker alone to discharge all these duties, which necessarily devolve much trouble and responsibility. It rests with him to watch the most profitable time of sale, and to attend to the interests of his employers by buying in the goods, if necessary, in order to offer them again for sale in the ordinary manner; which was done in this case to a large and beneficial amount; the broker advancing the money at his own risk and out of his own funds. The report, therefore, has originated in the mistake of confounding these two duties, distinct and different in degree of labor; and attempts to sustain itself on a principle which fails; viz., a comparison with ordinary peace sales.

COURT. Are there any cases in which the commission of 1l. per cent. has ever yet been disputed?

The *Registrar* answered that there were none.

The *King's Advocate* and *Arnold, contra*. It is a matter of serious complaint, on the part of the captors, that these accounts were not settled long before. The captors were obliged to proceed by monition before they were brought in. These outstanding demands against the agents explain whatever delay may appear in the cause, and remove from us the imputation of ripping up old transactions. But there is nothing invidious in \* the manner in [ \* 27 ] which the case is brought to the notice of the court: it is nominally the treasurer of the navy who appears to put in force the provisions of an act of parliament, the 45 Geo. III. c. 72, s. 108, which was made for the benefit of captors, and he is the proper officer to see that nothing is done to their prejudice; and the report which is now attempted to be set aside, has been framed after all the topics were urged before the registrar and merchants, which have since been put into the act on petition; and they decided according to the usual mercantile practice. We do not object to the general rate of brokerage, nor deny it ought to be usually 1l. per cent.; and we admit that it was rightly allowed on the sale of East India prize goods up to 1806, but not since; so that we dispose of the practice of a period of thirteen years before the time when these accounts

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Harregard. 1 Hagg.

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were referred to the registrar. They then adverted to the 33 Geo. III. c. 52, s. 99, and to the 46 Geo. III. c. 113,<sup>1</sup> and argued, that there was a material diminution of labor and responsibility in the duties of a broker at the East India Company's sale. The sale was conducted by the company and their officers; no other person could intermeddle in their arrangements and details; and the usual work of a broker being transferred to the company, a corresponding charge was allowed to be made by their officers. It was, then, a startling proposition to say, that the weight of responsibility was not thereby lessened. The fees of brokers vary according to circumstances, \*and should suffer a diminution in proportion to the facility of transacting their business. With respect to the allowance of the charge of 1*l.* per cent. upon the sale of the ship, that was not effected at the East India Company's sales; upon that ground no objection was made; it being admitted that it is the practice for brokers, having the entire management, care, and sale of prize property, and bearing all the responsibility, to make and be allowed such a charge. Much stress, however, has been laid on the buying in: but the measure is frequently resorted to by brokers at all sales, and may be a ground of special charge if the circumstances require it, but it ought not to affect the general commission. In this case no special service has been stated in the act; if there had been any, it should have been brought to the notice of the registrar and merchants, and they would have considered it. We therefore submit, that the court will enforce the effect of the monition, and condemn the other party in costs.

## JUDGMENT.

LORD STOWELL. This question comes before the court in a way not to induce me to examine it with very great precision. It involves but a small interest. The whole matter turns on 80*l.*; a small sum out of many thousands; and it is connected with an account that has been settled long ago, in which the immediate parties seem to have acquiesced: It should have been required to be refunded when paid. This, however, is not the whole objection that presents itself to my mind. To charge, as has been here charged, appears [\*29] conformable to general practice; it is so alleged in the \*act on petition, and it has not been denied. A similar allowance of brokerage has been made in other preceding cases, and though

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<sup>1</sup> By 53 Geo. III. c. 155, private trade is permitted to the East Indies. See the regulations under ss. 6 & 26.

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Harregard. 1 Hagg.

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this practice did not run through the whole war, it prevailed for several years. An act of parliament, which passed in the year 1806,<sup>1</sup> is alleged to have introduced an important change in the sale of prize goods, being the produce of the East Indies or China : under its provisions the sale of all East India goods is transferred to the company's sales ; and it is with reference chiefly to this act of parliament that an alteration of brokerage is argued to have taken place, to the extent of 10s. per cent., being one half of the old and established commission ; for it is fully admitted that, prior to the statute, 1l. per cent. was uniformly allowed, and that all persons employed in business of this kind acted upon the supposition that they were entitled to this larger compensation.

Now it is well known that prize property imposes much responsibility. The management of prize concerns brings with it a great deal of occupation that does not belong to brokers upon ordinary occasions, in which merchants act pretty much for themselves, and who are, therefore, entitled to curtail the brokerage fees ; but on war sales, conducted as they are almost exclusively by brokers, a commission of 1l. per cent. upon the proceeds seems long to have been established. This, then, being war property, though there may be some variation, and possibly some diminution of the broker's duties, from the sale being effected at the East India House, the question is, whether there should be any diminution of remuneration. [ \* 30 ] What, however, disposes me to decline any minute consideration of this by-gone transaction, is, that the case comes at a time when it is too late for subsequent correction. The concerns of the war are nearly wound up. It may, indeed, be a fit subject for consideration in case of another war, if such unfortunately should happen ; but the transactions of the late one are so nearly closed that there would be now but little advantage to the public from any change in the matter before me. I desire to be understood that I do not reflect upon the judgment of the registrar and merchants, if I differ from their report ; but I notice that they do not state their reasons for making the deduction, and perhaps it is not usual for them so to do. Perhaps they do not concur in the objections that are made, or they may have others. I do not object to this absence of disclosure of the grounds upon which they have made this disallowance ; but I lay hold of the circumstance, and shall avail myself of it in the course that I am disposed to adopt.

The objection to the rate of brokerage has been taken properly

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<sup>1</sup> 46 Geo. III. c. 113.

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The Union. 1 Hagg.

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enough by the public officers. It is their duty to look sharply after these things; and the gentleman<sup>1</sup> upon whose attestation these proceedings were instituted has done so, in a variety of instances, for the benefit of the public, and the private interest of captors. The present question turns upon this consideration, whether the transfer of sale to the East India Company does, or does not, materially diminish the trouble of the broker. It does not appear to me [ \* 31 ] that it \* does, as far as the court can judge with the little means it possesses for mercantile business. It does not seem to me to alter the course of the transaction, so as to make a different charge of brokerage absolute and necessary. But I again advert to the lateness of time at which the court is asked to investigate these charges. The application comes at too remote a period for correction of any extent; the account has been settled long ago; and the court does not think that it is called upon to say there has been any unfair charge, or more than ought to have been demanded and allowed. In my opinion, the business of the broker was not materially altered. A great degree of personal responsibility was required of him. It is, however, a case upon which the court can exercise but a superficial judgment; but it sees no appearance of minor responsibility in the broker, who is specially called upon, in all prize transactions to exercise a very guarded discretion.

Upon these considerations, I am not satisfied that there is any reason for me to swerve from what I set out with; and I am of opinion that no solid ground exists upon which the objection that has been taken to this ancient scale of allowance can be supported. I therefore dismiss Mr. Marten from the effect of the monition.

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[ \* 32 ]

\* UNION, Putnam.

March 14, 1822.

Breach of navigation laws. Excuse, want of water; held fraudulent. Sentence of Vice-Admiralty Court affirmed.

THIS was an American brig, which, laden with a cargo of fish, soap, candles, flour, and beef, was condemned in the Vice-Admiralty Court at Jamaica, for a breach of the colonial laws.<sup>1</sup>

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<sup>1</sup> Mr. Hancock.

<sup>2</sup> The statutes particularly cited in the information were the 12 Charles II. c. 18,

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The Union. 1 Hagg.

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The master stated, in his claim, "that this ship, with her cargo, being the property of merchants resident at Salem, in the state of Massachusetts, sailed from that port on the 12th of January, 1819, bound for St. Jago de Cuba; that, being a dull sailor and very deeply laden, they kept as much as possible to the windward, and thought it safer to come down through the Mona passage, and proceed along the south side of St. Domingo, in preference to the north side of that island, and to come through the windward passage, according to the advice of one of the owners. On the 12th of February they made Cape Tiburon; and notwithstanding all their exertions to weather the east end of the island, and make the port of St. Jago de Cuba, the wind blowing strong from the northward during [ \* 33 ] the night, the brig was carried down to leeward, until they made Cape Morant; when, finding their water nearly out, and that it would be several days before they could reach Cuba, or that they might be obliged even to bear away for the Havana, they determined upon putting into some port for a supply of water, and accordingly bore away for the harbor of Port Royal, in Jamaica, which she reached on the 13th, about five, P. M., and was shortly afterwards seized by Captain Malcolm, of H. M. S. Sybille.

When the case had been opened, and the evidence read, the court observed — That it was not denied that the course this ship took was not the ordinary course; it therefore requires some explanation; and the *onus probandi* lies on the claimants and appellants. I wish their counsel to begin. The question of navigation is so intricate that it must be left to the judgment of the gentlemen by whom I am assisted.<sup>1</sup>

For the appellants, *Lushington* and *Dodson*. No imputation of fraud can be substantiated in this case. The course by the Mona passage is a very usual course for American vessels in their way to St. Jago de Cuba. It is also clearly proved that there was no waste of water; none was thrown overboard, nor started; but the vessel,

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and the 7 & 8 Will. III. c. 22. The system of navigation law has since undergone considerable changes and relaxations. See the 3 Geo. IV. c. 43; 3 Geo. IV. c. 44; 3 Geo. IV. c. 45, and the 6 Geo. IV. c. 109, entitled "An Act for the encouragement of British shipping and navigation," which enacts that, from and after the 5th of January, 1826, this act shall come into force and operation, and shall constitute and be the law of navigation of the British empire (s. 1.) For any general information upon this subject, the reader may safely refer to the second edition of Mr. Holt's work on the shipping and navigation laws, Part I. ch. 1.

<sup>1</sup> The court was assisted by two of the elder brethren of the Trinity House.



having only three to four gallons remaining, is driven by inevitable distress for water into Port Royal. She enters it in the daytime, with a pilot previously taken on board, and with a cargo of [ \* 34 ] such a nature \* as to be totally prohibited, (which the master knew,) and with a certainty of being seized, searched, and examined; for there was a king's ship lying in the harbor at the very time. Can it, then, be supposed that the master would enter such a port with a fraudulent intention? On entering the harbor, he applies to the king's ship for a supply of water. He converses with the captain, and says he is willing to give up his log-book and the usual and regular ship's papers. The master swears, and there is in this case no contradictory testimony, that the cargo was specially selected for the Spanish colonies, and not for the British, though it is impossible that there should not be some few articles suitable to both. The court, it is true, holds the colonial laws strictly, but not so much so as not to allow any circumstances to be a justifiable excuse for an infringement of them; and we submit that the history of this case is such that the court will not presume a fraudulent intention, where it is not most clearly established by positive proof.

For the respondents, the *King's Advocate* and *Adams*. This case was considered by the court below as one of great importance. The documents that have been transmitted are very full; and the great leading fact in the cause we are all agreed upon, namely, this American ship, laden with a cargo, came into Port Royal. The general presumption then follows that she came for the purpose of delivering her cargo. All laws must, undoubtedly, bend to circumstances of necessity; but one of the first rules in considering necessities, is, that a party is to have no benefit from necessities of his own creation, or if he could \* have prevented them. The witnesses [ \* 35 ] depose that the quantity of water that was taken on board was sufficient for the ordinary voyage from Salem to St. Jago; but the master takes an extraordinary course, and one that is unusual; he was, then, bound to take unusual provision. He deviates in a sea that is much exposed to currents, and particularly in coasting. The vessel is described as being heavily laden, and a dull sailer; and there is no pretence of an investigation as to the quantity of water. The last cask is not gauged, to see how much is left, and the ship gets to the east end of Jamaica before the deficiency presents itself. It is not sufficient, then, for the master to say, "I did this through a defect of water, but I'll not tell you how that was caused." No attempt is made to put the crew on short allowance; they do not avail themselves of other ports that were at hand, nor do they take

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advantage of the means of communication with the shore which the pilot-boat offered. Distress was a marketable thing; it was what they wanted. Besides these circumstances, there is an equivocation of the master, who said, in the first instance, that he was driven by distress of weather, and of water, to go through the Mona passage; but now he swears, in his affidavit of claim, that it was his original destination. Discrepancy is always a great feature in unfair cases. The absence of clandestinity is pointed out to show the absence of illegality; but there was nothing inherent in the nature of the cargo to make it so unacceptable at the port of Kingston, and the master did not intend to smuggle it in. He made use of the ship's want of water for the means of introduction, having \* before ex- [ \* 36 ] pressed a hope that the port was open; but if he did not find it so, he would then be able to put up his excuse. Clandestinity is not necessary in such a case. Before a person is entitled to a claim of necessity, it is incumbent on him to show that he has made every effort to avoid it; and, in this case, such a necessity is not proved as to permit an illegal act.

#### JUDGMENT.

LORD STOWELL. It is a source of great satisfaction to me, that I am assisted in this case by two gentlemen of nautical experience. The ship in question was found in a port of Jamaica, where it ought not to have been. The fact, therefore, of its being in that port requires some explanation, and it must be of a satisfactory nature;—that is the demand of the law. Now it is a rule of this and of other courts, that where the fact is certain and the explanation doubtful, that we must stick by the fact, and not by the explanation: here the fact is clear, and it must rest with you, gentlemen, (addressing the Trinity Masters,) to judge of the explanation. It is not necessary that the explanation should be such as excludes all possibility of doubt, but that it should satisfactorily appear, there were no fraudulent purposes lying at the bottom of it. It is sufficient to satisfy your own consciences that the intention was sincere, and not grounded in fraud. Now, in fraudulent cases, it has been observed, the intention is kept secret, and is not communicated to the whole of the crew. It is impossible, then, for those who have to apply the law to take the rule laid down for the court, that there must be a clear and indisputable proof \* of intention of fraud; for if conduct [ \* 37 ] necessarily shows fraud, it is sufficient to be satisfied of its existence on reasonable grounds.

The only excuse in this case, for it is a single question, is a want of water. If that be proved to exist without any fault of the party;

if it be discovered in proper time, and acted upon with proper precaution; then such a necessity is shown as would give a vessel all the privileges of necessity. But it is a circumstance which is suspicious, if there be not a sufficient quantity of water put on board at the first sailing of the ship: this, however, is a doubtful matter in the present case, as I observe that the number of the crew is not stated, nor can it now be well ascertained. There is, therefore, no distinct recognition of that circumstance.

It appears that this vessel took a longer circuitous voyage than was necessary; and it seems extraordinary that no notice whatever is taken about a supply of water till the approach of the ship to Jamaica. I must here remark, that if a master and officers do not do what men with discreet intentions would do, it goes far to discredit any account they may give of their transactions. Another circumstance renders this story highly improbable; the ship passed many other ports and islands where she might have got an additional supply of water. There appears, then, to have been a latent purpose; and the vessel hovers about Jamaica till the state of the wind enables the master to execute it.

Much stress has been laid upon the ship coming into Port Royal in open daylight: to this, however, it has been justly answered, "you come with an excuse in your hand;" it does not pretend [ \* 38 ] to be a bold and open adventure; and it is not a practicable thing, I conceive, to enter such a port at night; it is defended and strictly watched: the cargo, too, is miscellaneous, and as well fitted for that market as for Cuba. The court, then, can attribute no such purgative merit to this act as has been attempted to be made out in vindication of the master. His excuse has been examined on the spot where it was made, and has been rejected. The ship was not seized without a previous communication with the local authorities, and the whole proceedings at Jamaica were conducted in a candid and attentive manner. If, then, you can say that you are satisfied that the conduct of the master is clear from the beginning, the excuse must prevail; but if you think that the excuse is groundless, it is your duty to give your opinion in affirmance of the sentence of the court below. The nautical part of the case must be left entirely to your experience and consideration.

The court, having conferred with the Trinity Masters, added, The gentlemen by whom I am assisted are clearly of opinion that there was no necessity for this ship to enter the port of Jamaica; that there were many other opportunities of obtaining a supply of water; and, in fact, that it is not a sincere history in any part of it. Judgment affirmed, with the costs of the appeal.

## PRIZE COURT.

[ \*39 ]

## BOOTY IN THE PENINSULA.

May 14, 1822.

The 57 Geo. III. c. 127, gives to Greenwich Hospital a claim of 5 per cent. "upon all grants whatsoever."

*Held*, that the generality of the terms should be restricted, and confined to remunerative grants purely naval.<sup>1</sup>

A monition, calling upon the Hospital to refund this deduction, upon the ground of its having been made in a case of conjunct expedition, not enforced.

Per centage allowed.

That is clearly a conjunct expedition, which is directed by competent authority, combining together the actions of two different species of force for the attainment of some common specific purpose.

THIS question arose upon a monition calling upon the governors and treasurer of his Majesty's Royal Hospital at Greenwich, to refund the payment of 5 per cent. which had been made to that institution, under the provisions of the 57 Geo. III. c. 127, which subjects "all grants whatsoever," to such a deduction. The grant, in this case, was directed to be distributed among the officers, seamen, and marines, under the command of Lord Keith, and for captures taken from the enemy in 1812, 1813, and 1814, and appropriated to the public service.

For Lord Keith, *Jenner* and *Lushington*. Is the sum of money upon which this question arises to be considered as proceeds of prize or booty, or as a grant from the crown to the royal navy and marines? We contend, that the operations themselves, connected with the orders under which they were carried on, are of the nature of a conjunct expedition, and that an interest accrued to the captors without any vote or grant. In the case of *Genoa*,<sup>2</sup> the court reviewed the acts of parliament bearing upon the subject; and it confined the terms "all grants whatsoever," to naval captures alone. It said,

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<sup>1</sup> [For other cases as to this per centage, see *The Thetis*, 3 Hagg. Ad. R. 228; *Genoa*, 2 Dod. 444.]

<sup>2</sup> Decided July 19th, 1820.

“ The word prize evidently means maritime capture, effected [ \*40 ] by maritime force only— ships and cargoes taken by ships. It is perfectly well known, that a land force has no interest in prize properly so called; what a land force takes by itself is not prize, but booty.” This grant cannot be considered as coming within this construction of the court. The navy alone had no exclusive title; for the captures were not purely naval. How could the capture of St. Sebastian have been effected by the navy, without the assistance of the army? If the property had been captured by the navy alone, it would have come here for adjudication. There was a direct coöperation at St. Sebastian, as well as on the River Gironne. It may be said, there is a distinction between this case and the case of Genoa; that, in the latter case, the property condemned was the same that was actually taken, but that here it was given up; and so it was. This, however, was owing to the exigencies of the country; and the sum granted out by parliament was exactly the same that was claimed. It would, therefore, be highly inequitable that the grantees should suffer by a per centage from this concession. With respect to the grants made for the captures of Naples and of Algiers, the first was a naval capture only, and in the second there was no conjunct expedition; so that a per centage might attach, notwithstanding the service that was rendered was by a naval force alone. They then adverted to the prescribed mode of appointing a navy agent under the 45 Geo. III. c. 72, s. 53, and showed that, with regard to this case, Lord Keith acted for the whole naval force. He appointed his own agent, who was accountable to him, and he, Lord Keith, to the force. But it is alleged, that the money has [ \*41 ] been paid to the Hospital three years ago, and that the sum having been appropriated, it is a great hardship to call upon that establishment to refund. But the court well knows its power under the provisions of the 45 Geo. III. c. 72, s. 108; and the subsequent prize acts have extended it over grants of all kinds. There is, therefore, an ample jurisdiction, and it is bound to enforce the monition.

*King's Advocate* and *Arnold, contra*. The facts of this case are not denied, but the nature of them. The whole matter has been completely settled by the voluntary act of the parties themselves, and we apprehend that the court will not rescind it; especially after so great a length of time, and when the money has been already appropriated. One of the inconveniences, arising from this application, is the danger of a precedent; and the agitation of this cause has already

led to the issuing of a similar monition upon the capture of Cayenne.<sup>1</sup>

\* It is singular, that the terms in which the grant is drawn [ \* 42 ] have not been referred to. The construction of them is material; and there is no great \*latitude in deviating from [ \* 43 ]

<sup>1</sup> In this case a monition had issued, on behalf of Sir James Yeo (as the representative of his father,) and the officers and crew of H. M. S. *Confiance*, calling upon Greenwich Hospital, to show cause why the 5l. per centage, paid into their treasury upon the sum of 11,500l. being part of the proceeds arising from the capture of the city of Cayenne, should not be refunded. The circumstances of the capture of French Guiana are detailed in 2 Dodson, 151. Jenner and Lushington now submitted that this was a capture of booty effected by a conjunct expedition of sea and land forces, in which the military force was the most considerable; and the court having already decided in the case of Genoa and its dependencies, that the 57 Geo. III. c. 127, did not apply to conjunct expeditions, but to purely naval captures, would decree the Hospital to refund the percentage, as having been, in this instance, erroneously paid. On the other hand, the *King's Advocate* and *Arnold* relied on the terms in which this grant had been made. It issued out of the treasury after payment of the usual percentage or duty; and it is expressly called, a grant to the royal navy and marines; and, therefore, within the terms of the act of parliament. Besides, in regard to conjunct expeditions, there was this very material distinction between the case of Genoa and the present; — that the court, in the former case, spoke of conjunct expeditions of British sea and land forces; but the capture of Cayenne could not be so regarded; for the military were entirely Portuguese; and it was not enough to show that they were our allies at the time, to bring the present case within the same principle.

#### JUDGMENT

**LORD STOWELL.** This is a demand upon Greenwich Hospital to refund the money that has been paid to that institution, in the shape of a per centage. The money was originally condemned to the crown; and if, in the terms of the grant, by which the crown divested itself of this property, the union of British and Portuguese force had been called a conjunct expedition, and the money had been given to be divided as in a case of conjunct expedition, the court must have attended to the terms of the grant. It is true that the place and property surrendered to a British naval force, co-operating with a Portuguese military force, and so far it may be considered a conjunct expedition. But it was afterwards agreed, for the convenience of both parties, that their respective proportions of benefit should be adjusted by arbitration. A distinction is drawn by those to whom the allotment was intrusted, and the Portuguese take the larger share, a share corresponding to their numbers. Here, then, is a complete severance; and the judgment of this court was taken in the usual way, upon the British share, and a sentence of condemnation passed to the crown. The Portuguese share is not mentioned in the proceedings that have been had in this case. They all refer to the grant made to Sir James Yeo and those who acted under him; and the grant is made to them to be distributed according to the proclamation of the 15th of June, 1808, subject to the sanctions of the prize act. The case of Genoa, therefore, does not apply; for this is a purely naval grant, and the court has so considered it. Under these circumstances I am of opinion that the percentage has not been paid in error; and I dismiss Greenwich Hospital from all further observance of this suit.

them. Nothing, however, can be found in the grant, that leads to the construction of the opposite side. The vote of parliament is the only authentic instrument. The money was granted by parliament to the king to be at his disposal for a naval remuneration; and the broad words of the 57 Geo. III. c. 127, so expressed on purpose to correct some former inaccuracies and omissions, are applied to the precise terms of the vote of parliament in which the grant is made to the navy. The agent put his construction upon the matter, and paid over the money, in which the captors acquiesced. We deny that the case of Genoa has any application. That case stood upon its own ground, and cannot be extended. That was a conjunct expedition, authorized by this government, under the joint command of persons invested for that purpose; and the main characteristic of conjunct expeditions arises from the form prescribed to them by the authority of government. There is a marked and substantial distinction between a general coöperation and a conjunct expedition. *The Dordrecht*, 2 Rob. 64, and *The Stella del Norte*, 5 Rob. 350, where it is expressly said, that the Prize Act enables the navy to take prizes to themselves in acting against forts, even if assisted by a land force. In the present case, two British officers with some guerillas in alliance with the British troop, acted with the navy; but not in way to make it a union of force for a conjunct expedition; and if any property had been captured, it might have been brought home for condemnation

to the navy; for whatever is subject of vested interest in [ \* 44 ] prize, cannot afterwards \* be made matter of grant. At *St. Sebastian* nothing satisfactorily shows what was the nature of the property there taken; nor did the navy materially contribute to the result of the operations at *Bordeaux*. And the court will bear in mind, with regard to the captures upon *The Gironne*, that there was a condemnation of *The Regulus* and other vessels there taken, to the navy exclusively. There is no intimation from the Duke of Wellington that any one was entitled \* to share, except himself and the army.

[COURT. Nothing is stated in the Duke of Wellington's memorial that gave interest to the navy, and yet the sum of 116,450*l.* is reserved to them out of the sum claimed by the army. The question that the court would like to have answered is, why this was so made? It might be that parliament thought the demand more than the army was strictly entitled to, and so reserved it; but there is no proof that it was reserved for the navy. As the matter is left, the court is bound to consider that the army thought itself entitled to the whole. It did not, therefore admit a joint capture.]

The army, certainly, claimed the whole; but parliament did not

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Booty in the Peninsula. 1 Hagg.

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so consider their claim, for it granted them only a portion. We do not object to the introduction of these memorials into the case; but, unsupported by affidavits, they are scarcely of the nature of legal evidence, and cannot enable the court to put a construction upon an act of parliament. Upon the grant to the army it was natural and just that there might be a collateral expectation in the navy; so they memorialized after the example of the army; but nothing arises from the acts of the parties \* themselves, to show that [ \* 45 ] there was a joint interest growing out of these operations.

## JUDGMENT.

LORD STOWELL. The question is, whether a sum of 116,450*l.* granted by a vote of the House of Commons, and confirmed by act of parliament, as a reward to the fleet under the command of Lord Keith, on the north coasts of Spain, and afterwards on the south-west coasts of France, is subject to a deduction of five per cent., claimed by Greenwich Hospital under and by virtue of a late act of parliament,<sup>1</sup> which subjects "all grants whatsoever" to such a deduction?

This court has found it necessary to restrict the generality of the terms, and to confine the words all grants, to naval grants that may be made to captors in such cases where a strict right of prize to the property taken does not arise under the original prize act; and several such cases may happen, and remunerative grants be made upon them; and consequently, in the judgment of this court, subject to the deduction. This court, so holding, has in consequence held, that grants made of property taken in conjunct expeditions were not subject to such a deduction, being not taken by a force simply and solely naval, but by the joint acquisition of a naval and military force acting together, in what is termed a conjunct expedition.

In the case of the property taken at Genoa<sup>2</sup> by such a mixed force, the court held, that it was \* not properly a naval [ \* 46 ] grant; and that the fleet's share was not subject to the deduction upon a claim made by the Hospital, after payment of it had been refused, and an attempt made here to enforce it. The present case originates differently; for the money has been actually paid here by the agent, acting upon his opinion that it was legally

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<sup>1</sup> 57 Geo. III. c. 127.

<sup>2</sup> Genoa and its dependencies. This case was decided, July 19th, 1820. [2 Dod. 444.]



due; but which opinion he changed upon finding that the court had, in the case of the Genoa, held otherwise with regard to conjunct expeditions, in which judgment the Hospital had acquiesced, and by that acquiescence had confirmed it as the standing doctrine of the court, at least for the present. The agent and his employers, conceiving the property here in question to have been so taken, and for which the grants are remunerative, insist upon the exclusion of the Hospital's title, and come here for a compulsory refunding. An operation of refunding is usually attended with difficulties, and, in this case, it is argued to be attended with difficulties respecting the jurisdiction. I do not feel it to be incumbent upon me to enter anxiously into that question: the opinion I mean to express upon the case generally, does not impose upon me the necessity.

The property here which begets the present question is not the actual property taken, but it represents it. It is a sum voted by Parliament upon a valuation sent in by the Duke of Wellington of the stores, ammunition, and other effects taken in the various battles fought, and places taken by his army, to the amount of nearly 916,500*l*. Many of these were transactions in the interior of Portugal and Spain, in which the ships under Lord Keith could [ \*47 ] have no more to do than \*the fleet under Sir James Saumarez, in the Baltic; many of them prior to the sailing of the detachment from the fleet, and many of them entirely in the interior of those countries, in which the fleet could have had no coöperation of any kind, physical or moral, whatever. The application, therefore, on the part of the fleet, seems to have been restricted to those transactions in which alone the fleet could be considered as coöperative. The only possible cases are three: 1st, The combination of Sir Home Popham with the guerillas; 2dly, The capture of St. Sebastian; 3dly, The siege of Bourdeaux.

Now, it is argued, that these were coöperations that clearly compose a case of a conjunct expedition. Here has been, at those three times, important auxiliary aid supplied, claimed, and acknowledged in more than one instance. This, however, may not be enough to form a conjunct expedition. It may be difficult, and perhaps perilous to define it negatively and exclusively. It is more easy and safe to define it affirmatively, that that is clearly a conjunct expedition, which is directed by competent authority, combining together the actions of two different species of force for the attainment of some common specific purpose. The crown is, undoubtedly, the competent authority in all cases, and it is the leading feature of such a case; but it may not, in all cases, be a necessary antecedent ingredient; for if in a remote part of the globe, two commanders should

unite their different species of force for the attainment of an important object to the State, but for which it was impossible, on account of distance, to obtain its previous direction, yet if a service is \*performed that received its approbation, the [ \*48 ] court would be inclined to hold that conjunction to be lawfully and validly constituted; if so, within the range of an useful and approved discretion.

The degrees of coöperation that are requisite for such a purpose are less definable; they may vary in number, and magnitude, and extent; and it may be difficult to assign the point where the mere coöperation rises into absolute conjunction. There may be much of the former that can hardly be characterized as the latter. In a large sense, the army and navy are coöperating, throughout a whole war, in distressing the enemy *viis et modis*; sometimes in contact, and sometimes at a distance, and in total ignorance of each other's movements and purposes. Many associations may exist, and some coöperation given occasionally, yet no conjunct expedition. A squadron of armed ships may be employed to carry provisions and reinforcements to an army acting on the land, no doubt a very efficient contribution of assistance, and this may have been directed by a competent authority; but nobody can suppose that such circumstances alone would constitute a conjunct expedition.

Now, first, with respect to the coöperation with the guerillas. I must observe, in the first place, that all the information we have upon the subject comes from the navy, the party interested. The army furnishes no lights upon this or any other parts of these subjects; and the whole account given is, that a detachment of the fleet, commanded by Lord Keith, then lying at Hamoaze, was directed by the Admiralty acting under orders from the Secretary of State, Lord Bathurst. And these orders appear clearly to have related to the \*assistance to be given to the Spanish guerillas in [ \*49 ] reducing a small French garrison upon the north coast of Spain, with a view of preventing Marmont calling them in to the reinforcement of his army, opposed to the Duke of Wellington's progress towards France. Now this was instrumental and subsidiary to his movements, without doubt, but no junction with him, though subservient to his views, and of which he was, therefore, most probably informed. But, secondly, it was no junction directly with him, but with a force acting with sufficient independence to prevent their being considered as composing a direct part of his force. Part of the directions to Sir Home Popham is, to impress upon this volunteer force that a furtherance of the duke's views is paramount to all insulated service whatsoever: and the letter of the Under Secretary

of the Foreign Office expresses a doubt, how far the guerilla leaders could be induced. If the guerilla leaders are not induced, then to do so and so; — and he is to impress upon the guerillas the primary importance of such collateral services of themselves and the fleet. They were successfully and usefully performed, and they have not been overlooked. But, I think, it would be a most violent strain to say, that they established a conjunct expedition with the army; indeed, it has been hardly argued to that extent, and certainly without impression. This is the conclusion of the year 1812.

The greater reliance is had upon what took place at St. Sebastian, where the shipping acted in the seige and assault, in conjunction with the British force under Lord Lynedoch; and where [ \* 50 ] a portion of the naval officers performed a very \* meritorious service. A single occasional service of that kind, however direct and meritorious, has never been held to impress the character of a conjunct expedition. It is very proper that it should be duly considered, as far as that service is concerned; but it will not operate upon the nature of the general course of these transactions. That Sir George Collier, who had been sent out with additional ships, and the officers and men under his command, performed that particular service in a way that entitles them to the gratitude of their country, there can be no doubt. But is that gratitude to be only shown by the acceptance of this service, as a service upon a conjunct expedition? I have no doubt that if Sir George Collier had come there accidentally, and had not been compelled by his orders to quit that scene of action, that the same prompt exertion would have distinguished his conduct. These were the transactions of 1813.

Admiral Penrose succeeded to the command, and, as might of course be expected, to all the public spirit and zeal which had marked his predecessor. One transaction peculiarly meritorious emblazons his peculiar triumphs; but it is a service distinctly naval, — the clearing the Gironde of the enemy's ships, in order to facilitate the passage of the British army. If the fact be that a condemnation has passed exclusively to the fleet, it would be a waste of time to labor the proof that this service did not convert its own character into that of a conjunct expedition. Thus ends the year 1814.

As little, I think, can be argued with effect upon the transaction at Bourdeaux — the grave of French usurpation, but rendered so by the exertions of the \* British military force, and likewise by the good affections of the people of the place. Every thing requisite for the navy to do, was done, without all doubt; but the great mass of agency and responsibility was, both by the original destination of the king's government, and by the necessary

course of events, resting elsewhere. The sphere of naval action was limited and auxiliary. If it is possible to consider this course of naval actions as employment upon a conjunct expedition, I ask who is to be considered as the naval commander? Lord Keith, the commander of the channel fleet, was stationed in Hamoaze bay, or elsewhere in the channel, during the whole of those services — can he possibly be considered as the naval commander upon this expedition? I believe there would be great difficulty in discovering any such expedition, where the commanders were not personally present, jointly concerting and jointly executing their measures. It would be a totally novel application of the term. If Lord Keith cannot be so considered, to whom is it to be transferred? — to the naval commanders in succession — 1. Sir H. Popham; 2. Sir G. Collier; 3. Admiral Penrose? If so, here are three distinct expeditions in conjunction with the Duke of Wellington, with each of which the other two naval commanders had nothing to do, and with the parties in ignorance of the nature of their employment.

Nothing can be clearer than that the army have not considered themselves as acting in a conjunct expedition upon any part of these transactions, though the naval force executed some orders, dictated by the Duke of Wellington, or by the military commanders under him. No mind can reconcile \*itself to the supposi- [ \* 52 ] tion, that such a memorial, pleading the exclusive merits and claims of the army, without the slightest notice taken of the associated merits and claims, could have been presented, if any such conjunction had been known by them to exist. What is the constant practice in such cases? — that the commanders make a concurrent application, and pray an apportionment commensurate to their respective numbers: they finish by a conjunct application to the justice or benignity of the crown. It is conducted with the most unre-served confidence and communication on both sides. But here the three naval commanders do nothing in the way of urging their claims.

On the part of Lord Keith, the last person who could be charged with inattention to the claims of his gallant naval associates, he is totally quiescent; till, upon information accidentally conveyed to him, he finds that a grant had been actually made by parliament to the army, on a proposition made by the king's government. He presents a memorial on behalf of the ships employed upon the service. Did it occur to the government itself that here had been a conjunct expedition? If there had been such, it could have been no secret to them, nor could it have escaped their recollection, as it must have been formed under their authority and direction. But no such recol-

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The Minerva. 1 Hagg.

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lection occurs. A grant of remuneration for naval services of occasional coöperation is made; but such a grant as never was seen in the case of a conjunct expedition—not a general grant, combining the two services—not proportioned, as prayed, to the respective numbers in each; but widely different. It is in two separate instruments, appropriating a sum distinctly to each; and in the descriptive language used by parliament, the part assigned to the fleet is described as a naval prize; and which they were content to accept as such.

I will now, however, suppose that all this has passed incorrectly; that there has been a conjunct expedition, though nobody suspected it; and that the army, and the navy, and the king's government, and the parliament, and, if I may finish the climax very humbly, this court, have all been in error; what follows? That I can in this stage correct this error, and take upon myself to say that, because the grant ought to have been otherwise, I will act upon it as if it had; that is language much too high for me to use. I must take the grant as I find it, and apply it accordingly, on the persuasion that it had been framed with all due consideration and knowledge. I can look no farther, nor pursue a private opinion of my own, if I entertained it. These grants being made upon views of the subject quite incompatible with the nature of a conjunct expedition, I must consider these views as definitive, and, consequently, that the claim made by the hospital has been duly made, and rightly submitted to by the agent in the first instance; and that the money so paid ought not to be refunded.

[ \* 54 ]

\* MINERVA, Dale.

June 11, 1822.

**Mariner's wages.** Award of a magistrate under the 59 Geo. III. c. 58, affirmed, with costs. A receipt, whether stamped or not, if fraudulently obtained, is of no authority in the Court of Admiralty.

THIS was an appeal, in a case of mariner's wages, from an order of a justice of the peace under the 59 Geo. III. c. 58,<sup>1</sup> promoted by

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<sup>1</sup> The 59 Geo. III. c. 58, is entitled, "An Act for facilitating the recovery of the wages of seamen in the merchant service." It empowers magistrates, on the complaint of seamen; to settle disputes about wages not exceeding 20*l.*; and the decision of the justice of justices is to be final, unless an appeal to the Court of Admiralty is inter-

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The Minerva. 1 Hagg.

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Henry Dale, master of the above named ship, against James Higgins, late cook on board the same.

The act on petition<sup>1</sup> stated, that in June, 1820, the vessel, *Minerva*, being at Portsmouth, and bound on a voyage to Quebec, and from thence to any port in Great Britain at which she might be ordered to discharge her cargo, Higgins was hired by the master (Dale) or his agent, as cook during the voyage, at the rate of 2*l.* 5*s.* per month; that he \*signed, by his mark, the usual contract, [ \* 55 ] and continued in the service of the ship from the 12th June to 24th October following; when, the voyage being completed, he was, with his own consent, discharged at Plymouth; that previous thereto an account of wages and advances was made up by Dale, between him and Higgins, and the same was read over to and approved of by Higgins, in the presence of the mate, and the sum of 4*l.* 4*s.* 6*d.*, the balance thereof, was paid to him, and he gave a receipt for 9*l.* 18*s.*, the full amount of his said wages; that, notwithstanding the premises, on the 4th December, 1821, the said Dale was summoned to appear before Sir Henry White, one of the justices of the peace for the borough of Portsmouth, to answer the complaint of Higgins for not paying him his wages; when the said Sir Henry White (notwithstanding the receipt was produced to and admitted by Higgins) did order that Dale should pay unto Higgins the sum of 3*l.* 16*s.* 3*d.*, as the balance of his wages for the said voyage; whereupon the said Dale duly appealed. The mariner, in his reply, positively denied the master's statement as to the account, or that any sum was ever paid to him as the balance of his wages, or that he ever, to his knowledge, put his mark to any receipt in full; and alleged that, at the arrival of the vessel at Plymouth, he applied for the payment of wages then due to him, when the master offered to pay him 3*l.* as the balance, which he refused to accept; but at last, in order to get sufficient money to bring him to Portsmouth, and under a promise from the master that he would pay him the remain-

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posed by either party within seven days after the order is made. By s. 2, notice of appeal is to be given in writing within forty-eight hours after the order of the justice is made; and a monition is to be taken out against the adverse party within thirty days from the date of the said order; and bail, in double the amount of wages claimed, is to be given. By s. 4, seamen are not deprived of any other remedy to which they may resort; and, by s. 5, the provisions of the act do not extend to Scotland.

<sup>1</sup> A question had been raised, in this case, as to which party should first give the act on petition. The appellant contended that the party who supported the award should first state the grounds on which he relied to establish his claim to it; while, on the other hand, it was urged that the *gravamen* of appeal should be set forth. The court directed the appellant to set forth his act on petition.

der, if the agent of the ship had not already paid the difference to his wife, (who was authorized \*to receive 1*l.* per month, but which the captain stopped,) he took the 3*l.*; and by the directions of the master, signed, as he verily believed, a written memorandum, by making his cross thereto, to the effect that he had received the 3*l.* only; that the paper was never read over to him, nor did he know the contents of it.

For the appellant, *J. Addams*. The award is contrary to the spirit and letter of the 59 Geo. III. c. 58. The act of parliament confines the power of the magistrate to an immediate proceeding. It points out three periods of time<sup>1</sup>:—the entry of the vessel at the custom-house, the delivery of the cargo, the discharge of the seaman; \*and it empowers any seaman, in case the master refuses to pay him his wages, to complain to any justice of the peace “residing in or near to the place where the master shall then happen to be.” The word “then” can only apply to where the captain is at the time of the discharge of the seaman. In this case the seaman was discharged at Plymouth, in October, 1820, and he first makes his complaint at Portsmouth in December, 1821. The magistrate had no ground for his claim of jurisdiction. If he had

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<sup>1</sup> By s. 1, “From and after August 1st, 1819, it shall be lawful for any seaman, mariner, or other person, (except masters or apprentices,) who shall have served on board any ship or vessel trading from any port or place, or ports or places, in that part of the United Kingdom called England, to ports beyond the seas, or to any other port or place in Great Britain, by virtue or in pursuance of any contract or engagement, in writing or not in writing, and whether the same be by parol or by deed, under seal, or otherwise, in case the master or commander, or other person having or taking the charge of any such ship or vessel, after the expiration of two days from the time of entry of such ship or vessel at the custom-house, or from the delivery of her cargo, or from the time when such seaman or mariner, or other person, (except as aforesaid,) shall be discharged, which shall first happen, (unless an agreement shall have been made and entered into to the contrary, and, in that case, after the expiration of the time so stipulated or agreed for the payment of such wages as aforesaid,) neglect or refuse to pay to any such seaman, mariner, or other person, (except as aforesaid,) his or their wages, or any part thereof, to complain to any justice or justices of the peace residing in or near to the place where such ship or vessel shall have ended her voyage, or been cleared at the custom-house, or delivered her cargo, or to any justice or justices of the peace residing in or near to the place where such master or commander, or other person having or taking the charge of any such ship or vessel, or (in case of there being no master or commander, or other person in charge of any such ship or vessel) where any owner or owners thereof shall then happen to be; and thereupon it shall be lawful for any such justice, &c., upon such complaint made to them upon oath or affirmation, to issue a summons to such master, &c., to appear before him, and to examine seamen and witnesses on oath.”

jurisdiction fifteen months after the payment of the wages, at what period is it to cease? But the receipt was a sufficient bar to any further claim, and it ought to have been so considered.

*Lushington, contra.* The act of parliament makes it imperative upon the magistrate to take cognizance of the mariner's complaint; the words are only so far limited that a mariner would not be justified in instituting proceedings when the master or owner was at a distance; but here the master was present, and the complaint was made as soon as he came to the port where my party was living. The mariner gives his wife an authority to receive from the ship-agent 1*l.* per month during the voyage; and the master, from the Gulf of St. Lawrence, writes a letter directing this payment to be stopped. He alleges the misconduct of the man, but there is nothing of the kind proved. \* The wages were fairly earned, and [\* 58] were not finally adjusted at Plymouth. It is sworn that the receipt produced to the magistrate was not stamped; but, even if it were, this court has pronounced for wages in opposition to such evidence.

#### JUDGMENT.

**LORD STOWELL.** My mind is entirely made up with regard to the merits of this case. The decision of the magistrate was, I think, well founded, and I certainly shall sustain it. An objection was taken in argument to a want of jurisdiction in the magistrate, and it was said that he did not proceed conformably to the provisions of the act of parliament. That objection, however, if it rightly exists, should have been taken at an earlier stage, by way of protest, before the magistrate, and should not have been reserved for this late period of the cause. When the balance of accounts was produced, the mariner stated that he did not know what advances had been made to his wife during the voyage, which was necessary to be inquired into before he admitted the master's statement to be accurate. The master had deprived this poor woman of her allowance, for no sufficient reason that the court can discover; and the only ground alleged is that the husband was a profligate fellow. The course of this man's proceeding seems to me by no means satisfactory. It was incumbent upon him, when before the magistrates, to have justified his conduct by proper evidence. He might have produced witnesses in support of his statements; but he does no such thing. He relied solely upon a stamped paper — \* that is his own admission; [\* 59] and it is now sworn that, when the paper was produced below, it was not stamped; but whether it was or not, if the instrument



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The Castilia. 1 Hagg.

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were fraudulently obtained, this court can regard it as no authority against the justice of the case. I take the word of the magistrate most entirely. He states that the paper was not stamped when produced to him, and he is supported in this position by the constable. I affirm the award, and with costs.

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CASTILIA, Stewart.

June 25, 1822.

A seaman, who had engaged to serve on board a collier, "from Shields to London, and back," quits the vessel at the port of London: held, that he had not incurred a forfeiture of his wages, the master failing to supply him with provisions.

THIS was a suit promoted by a mariner, late belonging to the vessel Castilia, for the balance of his wages in a voyage "from Shields to London, and back." The vessel, with a cargo of coals, arrived at the port of London on the 17th December, 1819: soon afterwards the ice began to collect in the river, so that on the 29th it became impracticable to work the ship, and take out her cargo. The ship's articles were signed, agreeably to the 31 Geo. III. c. 39.

For the mariner, *Phillimore*.

*Lushington, contra.*

#### JUDGMENT.

LORD STOWELL. This is an application to the court by a mariner for wages earned, as he contends, agreeably to his contract. He was hired on the 3d December, 1819, and remained with the vessel to the 11th of January, in the following year, when he was compelled, as he says, with others of the crew, to quit the service of the ship, owing to a want of sufficient provisions. At the time he left the vessel, he had been on board twelve market-days from the period of the ship's arrival at her moorings in the port of London.

Now if the averment of the mariner, as set forth in his act on petition, be true, it is a sufficient justification of his desertion; for it is clearly the rule, both in the mercantile as well as in the naval service of Great Britain, that the seamen must be found with provisions

as long as they remain on board, and are willing to do their duty. Different customs have prevailed in different countries upon this point. It appears, from ancient authorities, when some maritime countries allowed a higher rate of wages to their mariners than this country, in those times allowed, it was expected by the maritime law of such countries, that the seamen should find their own means of subsistence at their own expense, and mess together upon their own private contributions.

There has been, in this case, a custom set up, on behalf of the mariner, that "by the regulations of the port of London, the crew of a collier is bound to remain by her but five market-days, to give time for the sale of the coals:" and it is admitted by the owners, "that where seamen engage on board a vessel in the coal trade for the run, or voyage, to London only, there is a custom as to the time of their staying on board after the mooring of the vessel, but that the same does not in any manner extend to seamen entering into contracts for a voyage to London and back to the port from whence they sailed:" and they further plead, "that by the uniform custom and practice of the port of London, with respect to the coal [ \* 61 ] trade, all seamen entering into ship's articles, similar to those before the court, are bound to continue in the service of the ship until the delivery of her cargo, and the full completion of the voyage by return to the port of lading, and that, on no account whatever, are they to be released and discharged from their contract, nor to be entitled to claim half wages, unless the ship alters her port of delivery." These averments give rise to an important question, and I should be sorry to settle it upon the evidence which is adduced in the present case. The balance of testimony before the court predominates against the custom asserted by the mariner; and it seems a reasonable thing that a ship should have a fair time to look about her for the disposal of her cargo; and if the mariners desert her without legal grounds, be there custom or not, they make themselves liable to punishment.

The merits of the present question, however, may be decided on the want of provisions. This part of the case is sufficiently established. It is the burden of the song in its commencement and in its conclusion, and is throughout set forth in the proceedings. It is said, on the part of the owners, that a considerable length of time elapsed before their agent could dispose of the cargo; partly owing to the ship being frozen up, and partly, without doubt, to his waiting for a better market; anxious as he would be to take advantage of the high price that the increased demand might be expected to create from the continuance of the frost. Both reasons probably acted on

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The Kammerhevie Rosenkrants. 1 Hagg.

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the broker; for it is well known, that where there is a great [ \* 62 ] distress for coals, ships are in the habit of waiting for an \* advanced price; a system which is much discountenanced in the London trade. The parties on both sides began to be a little tired: the captain said there were great expenses incurred by the ship (and this was a very just observation); and it became doubtful whether the eventual return might cover them, and indemnify his employers. A large fleet of colliers might come in and defeat the expectation of waiting. He proposes to the men, and the advice was proper enough, under these circumstances, to look out for some other employment, and they quit the ship at his suggestion; but they quitted it unsuccessfully. They again returned on board, and they continue with the ship until the provisions are stopped. This is then the real question in the cause, and the court must be guided by the predominance of evidence, which, in this part of the case, is in favor of the mariner's claim. It is credible in itself and consistent with probability. The men had no breakfast, and there was the same prospect with regard to dinner. I am therefore of opinion, that the departure of the seaman was justified, and that he is entitled to his wages, with the costs of this suit.

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KAMMERHEVIE ROSENKRANTS, Morck.

July 9, 1822.

A bottomry bondholder permitted to have a priority of lien upon the proceeds of the ship, to secure the reimbursement of his advances to the crew.<sup>1</sup>

ON behalf of the holders of a bottomry bond, the court was moved (upon affidavit, with a schedule of the wages due the crew, [ \* 63 ] and with the \* consent of the master, and a certificate of the Swedish consul annexed) to permit the bondholders to pay the wages of the crew, in order to save the expense arising from their detention on board, and to decree that they should be reimbursed their advances out of the proceeds of the ship, prior to the satisfaction of any other claim thereon.

Decreed.

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<sup>1</sup> [See The Adolph, 3 Hagg. Ad. R. 249.]

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The Woodbridge. 1 Hagg.

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## WOODBRIDGE, Munnings.

July 23, 1822.

Slave abolition acts. Appeal from the Mauritius for costs and damages against the seizor, not sustained. Sentence affirmed by partial costs, upon the appeal to the seizor.

THIS was an appeal from the Instance Court of Vice-Admiralty, at the Isle of France, to reverse the sentence, so far as the court had refused giving costs and damages to the claimant, upon a decree of restitution of his ship.

The Woodbridge arrived at the Mauritius in the month of January, 1819; and was seized by Captain Purvis, of H. M. S. *Magicienne*, upon information that eight blacks, who had been taken into the employment of the ship at Madagascar, were slaves. Proceedings were originally instituted against the ship and cargo; but the libel was afterwards amended and the cargo was released.<sup>1</sup>

\* Upon the case being opened, the court observed:—The [ \* 64 ] only question is; whether these eight persons were on board in apparent contravention of the law: they were not so in real, as far as the opinion of the Judge of the Vice-Admiralty court goes; because he has restored the ship. Unless the master of this vessel took the best steps to clear away all appearance of suspicion and jealousy, he could not expect Captain Purvis to release her upon his own responsibility. He ought to have had a proper register, and proper documents properly authenticated, to show the character of these individuals. Instead of this, some of his papers are antedated, and his original log is lost.

For the respondent, the *King's Advocate* and *Burnaby*. The substantial history of this case must be taken from Alford, the chief mate of The Woodbridge. There is no imputation upon his evidence: it may be unpopular, but if it is not to be received and respected, how are the facts to be reached? If Captain Purvis has, in the exercise of a fair power, not abused his privilege of search and

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<sup>1</sup> The libel was framed upon the 46 Geo. III. c. 52, and 47 Geo. III. sess. 1, c. 36. The 5 Geo. IV. c. 17, enacts, that dealing in slaves on the high seas shall be deemed piracy. But the laws relating to the abolition of the slave-trade are amended and consolidated by 5 Geo. IV. c. 113.

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The Woodbridge. 1 Hagg.

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inquiry, this court will not visit him with the penal and vindictive consequences prayed by the claimant; for these cases are put upon the footing of revenue cases: and where it is stated on the record, that there was a just cause of seizure, the owner has no claim to costs and damages. 46 Geo. III. c. 52, s. 18.

For the appellants, *Lushington* and *Dodson* argued upon the difficulty of obtaining regular clearances and ship's papers at the port of Tamatavie, where the eight blacks were embarked; and upon the improbability that the captain, for so small a number, would subject his ship and himself to all the penalties inflicted upon a [ \* 65 ] slave-trader. \* The men were taken on board from necessity; for there had been so much sickness among the crew of his vessel, that the number was reduced from sixty-one to ten men, and these extra hands were taken on board as sailors, with an obligation upon the master to return them to their own port. These men were woolly-headed blacks; and they were employed and used in the same manner as *Lascars*. [Court. *Lascars* and Chinese on board do not excite any suspicion; for slavery does not exist among them.] Whatever grounds there might be for the first seizure, nothing occurred to make the second justifiable; and if Captain Purvis had entertained any doubts upon the accuracy of the papers, and the statement of the master, he might in the intermediate time have sent to Madagascar for information.

#### JUDGMENT.

LORD STOWELL. I have already had occasion to observe, that in this case there is no other question but the single question whether eight persons, who were on board this ship on contract with some person, were there in such a capacity of slaves as would constitute the offence prohibited by the statute; or at least justify the seizure and detention of the ship for inquiry, though the case might turn out favorably, upon the inquiry instituted by the naval officer who seized, and applied to the court for the use of its jurisdiction in prosecuting it.

Here is no question respecting the property of the ship or cargo, such as often leads to long and laborious inquiries; no question respecting destination; none respecting contraband, unless [ \* 66 ] these eight men may be considered as falling under that description;—in short, here is nothing but the simple issue whether these eight persons were on board as slaves. And what it is that could have led to the accumulation of such an enormous mass of papers, no reasonable man could have anticipated by any

reasonable conjecture;—a mass, too, in a very large proportion of it, utterly insignificant and irrelevant. The learned person who presided in that court, and who knows, from experience in judicial habits, the proper extent to which such an inquiry should reach, must have seen, with great dissatisfaction, the proceedings loaded in such a reprehensible manner, and swelling out to a compass much better calculated to fill the purses of the practisers than to furnish the proper information for the court; examinations taken before the civil magistrates intruded at length into the admiralty proceedings; libel upon libel given in; every minute proceeding stated with formal prolixity; not even excluding the instruments of retainer to the several proctors; repeated examinations of the same witnesses, upon the same interrogatories; long protests followed by long affidavits stating the same facts, and proving nothing but the irritation of the parties; all the passages of private intercourse between them introduced;—in short, without describing particulars, every method resorted to, not excluding language grossly disrespectful to the judge, by which the real merits of the case could be overwhelmed and buried in a farrago of impertinent and irrelevant matter, evincing only the intention of those who conducted it to benefit themselves.

To the parties the effect has been lamentable, \*not only [ \* 67 ] in the immediate expense of such unnecessary proceedings, but in the detention of a valuable ship nearly two years, though a single month might have sufficed for producing a conclusion that might have been deemed satisfactory enough. With respect to the cargo there was no question at all; but it has had its share of the misfortune, having somehow or other crept into a libel, and not being released till some months after the seizure. Who is to answer for all this? Before I determine that point, I will recapitulate the facts of the case.

This was the seizure of a British ship by an officer of the royal navy, who, in that capacity, was specially authorized to make seizures of a similar description. It was the seizure of a ship having on board persons supposed to be slaves, or dealt with as such. It appears that Mr. Munnings, the captain and owner of this merchant-vessel, being desirous to avail himself of the premium offered to all persons importing asses or mules into the Mauritius, went thence to the port of Muscat, in the Red Sea, where he took on board a cargo of those animals, and set sail on his return. In the course of his voyage he was compelled to put into Madagascar. There the vessel was found to be not navigable with the hands she had on board, her crew having been reduced by sickness. Captain Munnings thereupon consulted the masters of two other merchantmen

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The Woodbridge. 1 Hagg.

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then lying at Tamatavie, who were unable to afford him the assistance he required, but recommended him to apply to the Sultan of Tamatavie; and the result of his application was that eight men were sent on board The Woodbridge. How or in what [ \*68 ] manner they were \*procured does not appear; but there certainly was no contract with them for wages, or otherwise, on the part of Captain Munnings. With these persons on board, the vessel sailed for Calcutta, whence she proceeded, with a cargo, to the Mauritius, and was there seized by Captain Purvis, for a supposed violation of the abolition laws.

These facts bring before me a case, which it is impossible for this court to see without feeling and expressing great concern and dissatisfaction. Here are large positive expenses incurred on both sides; and a much greater consequential loss of property occasioned in such a way as to disable this court from finding any adequate remedy. It is a duty, very painful in the discharge, to wade through such a mass of matter, without a prospect of being able to extricate the parties from the state of inconvenience into which they have been dragged by some unaccountable acts of negligence, by improper indulgence of passion and ill humor, and by the unfortunate advice to which they have submitted.

Here is a very simple issue of fact, whether these eight persons were aboard this ship in such a capacity of slaves as constituted the offence against the statute cited in the second article of the libel. This statute enacts, that "all manner of dealing and trading in the purchase, sale, barter, or transfer of slaves, or persons intended to be sold, transferred, used, or dealt with as slaves, that may be practised or carried on, in, at, to, or from any part of the coast or countries of Africa, shall be utterly abolished, prohibited, and declared to be unlawful; and also that all manner of dealing, either by way

[ \*69 ] of purchase, sale, barter, or transfer, \*or by means of any other contract or agreement whatsoever, relating to slaves, or to any persons intended to be dealt with as slaves, for the purpose of such slaves or persons being removed or transported either immediately or by transshipment at sea, or otherwise, is in like manner utterly abolished and declared to be unlawful."<sup>1</sup>

It is impossible not to see, that these are terms of great extent of possible application, and such as would require from any court a very deliberate and inquisitive attention to any case of fact that appeared to approach the limits within which the penalties were to be let loose

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<sup>1</sup> 47 Geo. III. sess. 1, c. 36.

upon the offender. They were devised by the legislature, engaged at that time (as it has been since)<sup>1</sup> in the ardent pursuit of an effective cure for an evil which is considered as of great magnitude, and conquerable only by a vigilant and searching police, looking on all sides, and into every artifice, by which the mischief complained of might seek to elude the prohibitions of the law. Nothing short of strong constructions of strong enactments could answer the expected purpose. All the avenues to fraud were to be shut up, even though immediate fraud might not be intended in the particular case. In short, a jealous and inquisitive guard was to be maintained against the possibilities of evil.

Upon the ship's arrival at the Mauritius, with eight persons on board bearing the appearance of slaves, Captain Purvis seized her. This was on the 27th of January, 1819. It is admitted that he was perfectly right in that act, and that he would have deserted his duty if he had not done so. Why he did not proceed [ \* 70 ] at that time is quite unaccounted for. He had nothing to do but to apply to the court for its monition to Mr. Munnings to produce his papers and witnesses to be examined. The court must have granted that monition, and would have enforced it; though Mr. Munnings does not seem to have had an adequate idea of the authority either of the seizing officer or of the court. Enough would then have appeared to raise the question of law on which the court had to decide; whether these persons were there in the capacity of slaves, so as to subject the captain and owner of the ship and of these slaves to the penalties of the act. The whole matter would have passed without any of those preliminary proceedings which afterwards served only to waste useful time, and to produce useless irritation.

Upon the inspection of these papers, and upon taking the story of these persons themselves, the whole case would have been before the court, with the exception of that small, though material, part afterwards added by Alford; and there was an opportunity of examining him; for I presume he was upon the island, and might have been compelled to submit; or further proof might have been ordered, to elucidate what was left obscure in the account given by these eight persons. But it is said, Why examine them? As far as I see in the case, the whole of the material facts is contained in their account, and Alford's, and in the documents. As to the three other witnesses, they say nothing material. Most of the remaining facts are undisputed—such as that the ship came into Madagascar with a dis-

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<sup>1</sup> See 5 Geo. IV. c. 113.



tressed crew, and engaged fresh hands there. These things [ \* 71 ] might have been \* better evidenced at Madagascar ; for Jean Renè, the person called Sultan of Tamatavie, be his character and nation what it may, appears from the certificate exhibited to be competently practised in forms, and to have been capable enough of giving such certificates as Mr. Munnings might have wished to carry for his own security against any misapprehension. Indeed, it is as regular a paper as could have come from a British consul ; and as this was an ordinary traffic, there can be little doubt of his competency to transact it, so far as might be necessary for the safety of those who dealt with him.

Now what would have appeared if Captain Purvis had proceeded in the first instance ? These facts, — that the men in question were sent on board without any contract of their own for wages, or for any thing else ; and, indeed, without any consent on their own part. They came in ignorance, and under false representations given, and without any assurance which they could rely on that they were ever to be brought back to Madagascar, or what was to become of them. Upon the papers and their evidence, it would have appeared that they were made free, and received manumission from Captain Munnings on the voyage ; thereby admitting on his part most decidedly, that they came on board not in a state of freedom, and likewise, that being not in a state of freedom, they must have been the slaves of Mr. Munnings ; for, otherwise, how could he have the power of manumitting them ? Nobody but their owner could do that. What circumstances could carry them nearer to the condition of slaves than these, — when they entered the ship without their consent, to be obliged to give their labor without any pay, and without [ \* 72 ] \* any certainty about their future destination ? It is impossible for a man to describe a more servile state than such circumstances as these compose. If Alford's evidence had been called in, (to whose testimony I see no objection,) it would have appeared that these certificates and entries had been prepared with dates that did not belong to them, but were better accommodated to the safety of the transaction. What was there to be opposed to this ? Why, first, that they were to work only as sailors, and did only so work. Surely they were not the less slaves on that account, if they were slaves at all. A slave may work like a sailor, as well as in any other capacity implying manual labor. Men do not take slaves to sit with their hands before them, doing nothing, but to be profitable by their labor, one way or other, by land or water, indifferently. Next it is said that they were treated as Lascars, in food, clothing, and employment. What does that prove ? These men

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The Woodbridge. 1 Hagg.

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could not be starved, nor kept, I apprehend, cheaper than Lascars. Lascars are not over voluptuous feeders on board a ship. As to clothing, hardly less could be afforded for the sake of mere decency; and the employment must of necessity be the same. But they were permitted to go ashore! And so, I imagine, slaves would occasionally be, especially in a country where they were totally ignorant of the language, and therefore not very likely to escape. But, I repeat, that so long as these men continued to be obliged to give their labor without any consent of theirs, so long they continued slaves, if slaves they came on board. Again, it is said that, at Calcutta there is a strict police, and the matter must have been strictly examined there. \*How so? Supposing the general police to [ \*73 ] be strict, it does not appear that there was any examination of these men; there is no copy of any proceeding of any court, or under any authority. Nothing appears but the mere fact that the ship escaped there, as she did afterwards at the Mauritius. It was after leaving Calcutta that Alford acquired his information, which was not till then possessed.

Supposing, as the fact was, that Alford's testimony was not in Captain Purvis's possession on the 27th of January, still there was quite enough to bring the question of law before the court, whether the taking these persons on board, though under the plea of an existing necessity, and for the sole purpose of navigating the ship, did not bring Captain Munnings's transaction within the terms of the penal prohibition, under the strict construction which seems expected to be applied to this class of statutes. Why Captain Purvis released the ship on the 27th of January, I am quite at a loss to conceive. In all probability, as far as I can collect from the terms of the learned judge's sentence, his judgment upon the matter of restitution would have been the same, but with an indemnity to Captain Purvis for the expenses of the proceeding; for to that he would clearly have been entitled, as nothing vexatious could be objected against him. In all probability the proceedings which led to the conclusion would have had a speedy termination, and no following mischief imputable to any body. But at the distance of five weeks, on the 5th of March, upon the reinforcement of the evidence by Alford's testimony, (how obtained does not appear, but nothing that does appear at all dishonors it,) Captain Purvis makes a fresh attack, and [ \*74 ] seizes the ship again. Then comes the tug of war. Mr. Munnings, who thought he had passed the ordeal, is again put upon his defence. Such a circumstance might, perhaps, have excited the resentment of a man less irritable than he appears to be. Warm hostilities ensue, stimulated by the advisers on whom I have already

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The Woodbridge. 1 Hagg.

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observed. The whole business is involved in a long and acrimonious contest, enveloped in obscurity, loaded with a voluminous mass of irrelevant matter, in which the real merits of the case are buried, and every thing seems given up to passion and disregard of all the interests that ought to have been attended to by the parties and their agents. Ship and cargo seem hardly to be thought of amidst all this unnecessary bustle about the law proceedings.

At the same time that I say this second seizure led to calamitous results, I do not mean to say, likewise, that it was a step which Captain Purvis was debarred from taking by any thing he had done before in abandoning the seizure. He might have further ground of suspicion; and even if he had not, he might, upon a careful reconsideration of all circumstances, think that he had acted too hastily both for his duty and his interest, and that it behooved him to look further into the inquiry than he had done. It cannot be alleged that he is legally to be treated as a wrongdoer in applying to the court for that intent. Witnesses are then examined. The court proceeding to sentence, on the 22d of May, restores the ship, leaving each party to pay his own costs; and I cannot say that I am inclined to disturb that sentence; because I think that errors had found [ \*75 ] their way into the \*conduct of both parties, though not in equal degree. The cargo had been libelled against very improperly. It was not subject to any forfeiture under the statute. This error was specially corrected by a fresh libel, but not without an addition of fresh expense; and the cargo was left to the resumption of the owner whenever he thought fit to take it. Why he did not resume it is quite inexplicable. He had nothing to do but to claim it, which it was his duty to do, and it would instantly have been redelivered to him by the court. Captain Munnings must settle that account with himself, for there he has nobody else to complain of.

I shall not enter into the matter of a petition by Mr. Munnings, which the judge disposed of with a condemnation in costs. I am not sure that it is included in any part of the present appeal, which seems to be an appeal from the ultimate sentence of restitution without costs or damages on either side.<sup>1</sup> From that sentence

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<sup>1</sup> BAROSSA, Tupper.

June 11, 1822.

Costs and damages seem incident to a sentence of restitution, where there has been "no probable ground of seizure.

THIS was an appeal from the Vice-Admiralty Court at Antigua. The vessel had

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The Woodbridge. 1 Hagg.

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both parties \* appealed; and; as far as appears, both [ \*76 ] with a sincere desire of prosecuting their appeals. It unhappily turns out that the ship was detained until February, 1821, lying unemployed, and consequently in a state of increasing deterioration; certainly to the great loss of the proprietor, but to which many causes have contributed, some of accident, some of unavoidable necessity, and some, I must say, of extraordinary inattention in the party or his agents. I can have no doubt of this, that the party might have had immediate restitution of his ship, pending both appeals, upon application to the court, and offering bail, for otherwise, undoubtedly, he could not; because no principle is better established in these courts, than that where there is an appeal, the property in question cannot be withdrawn but upon security given for the value.

It is first said, that the bail demanded was excessive. That cannot be; for it was exactly the appraised value, 10,000*l*. Then it is said, that Munnings had not credit there. Taking that to be the fact, which I should not otherwise have presumed from the value of his cargo, and the apparent extent of his means, I have only to observe, that that is his own misfortune; and that other men are not to lose their legal rights on that account. Men who engage in remote speculations have to encounter that among other inconveniences; for such persons \* certainly do not navigate [ \*77 ] upon smooth seas. But then it is said, that though his counsel admit, as they must do, that bail may be demanded, and must be given, in the case of a real *bonâ fide* appeal, yet this was a frivolous and insincere one. Now it never can be maintained that it

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been seized, and proceeded against on a charge of contraband trading: the judge decreed restitution to the owners; and declined certifying that there was any probable ground of seizure; but refused to condemn the seizors in costs and damages: on this ground the appeal was prosecuted. No appearance having been given for the seizors to the inhibition; the libel of appeal, which was quite in common form, was admitted *in pœnam*.

*Adams* now moved for a reversal of the sentence as far as regards the costs and damages which the owners had incurred. An exculpation from costs and damages could only arise from some probable cause of seizure, and, in this case, there was none whatever.

The *King's Advocate* stated, that no damages were set forth in the appellant's claim.

COURT. The cause of seizure was by no means sufficient to justify such an act. The registrar and merchants will appreciate the costs and damages which, certainly, have occurred. I condemn the seizors in their amount.

was insincere, merely because it was afterwards withdrawn upon the advice of more approved judgments than the party had before resorted to. He was prudently advised not to continue a contest with so determined an opponent; but the counsel estimate the real merits of the question very differently from what I do, when they represent this question as one that was placed out of all doubt, and could not be seriously contested. For I must say, that, looking at the terms of the statute, and recollecting the sort of construction which is required to be applied to them, I should have thought that this question, if it had come originally before me, imposed upon me the duty of giving it a very grave and deliberate consideration. I do not say that I might not have ultimately acquiesced in the same conclusion, for I do not mean to impugn the judge's sentence; but, weighing the facts of this case, and attending to the principle which I have stated, that though the intention of Captain Munnings might be perfectly innocent, yet the transaction was one, which, being permitted, might open a door to transactions of a different nature, I might have hesitated before I ventured to unlock that door. It is admitted that the case was most highly proper to be brought before the first court; and that the party was not perfectly justified in reserving to himself the right of resorting to a second opinion, can be doubted by none who have attended either to the

[ \*78 ] \* case itself, or to the terms in which the first opinion was delivered.

When the appeal of the seisor was notified to be withdrawn, the judge expressed his surprise that the cargo was still there, at the time that he gave his directions about the prosecution of the claimant's appeal. It turns out that both the parties principal had been long absent, the seisor called away by the necessities of public duty, and the claimant by some irresistible private business of his own. But he ought certainly to have left proper directions and proper authorities with agents, if he could have found any who would have paid attention to his interests as well as to their own. It is said that he could give no positive directions, because he could not anticipate the desertion of the seisor's appeal. What he could do he should have done. He should have left specific directions for such possible cases as might be foreseen, if he withdrew himself from the scene of action. Nothing seems to have been provided or done by the agents. Even on the day of trial he had been compelled to find the law and the logic for himself; for I infer from the sentence, that he had been compelled to put himself into the unfortunate situation of being his own lawyer, and pleading his own cause. It travels up here at last, loaded with an enormous ex-

pense and loss, which this court cannot contemplate without horror and concern, and certainly the more of both, because it has all been most unnecessarily produced, and the matter is now placed beyond the reach of any redress which this court can administer.

The ship was most rightly seized in the execution of those laws, which the legislature has provided \*for the suppression of slavery. There is no doubt but that such laws must produce occasionally enormous losses of private property, to be defended only by the very beneficial purpose they are intended to effect. It must happen, that in remote parts of the world, where the execution of such laws naturally commences, there must be some improper seizures, and sometimes, I may say, improper adjudications, — want of credit in the distant settlements whither the parties are carried, or where they are found, — want of confidence in the agents, whom, though total strangers, they are obliged to employ, — appeals to be prosecuted at a great distance of time and place. These are evils generally, and, I presume, unavoidably incident to the system; and the zeal and acuteness of those who have attended to this great subject, aided by the same qualities on the part of the government and the legislature, have not been able to provide a better system.

On weighing the pretensions of the two parties, I must allow Captain Purvis the credit of having done nothing wrong except the non-prosecution of the inquiry upon the first seizure, in which he has suffered very severely by not being allowed his costs in the first instance. I say severely, because it is evident, from the proceedings with which this cause has been loaded, that those expenses must have been inordinately oppressive. Nothing that follows, on his part, is taxable with blame. He had a right to demand and compel the production of papers and of witnesses; he had a right to appeal, and a sufficient ground for appeal; he had a right to demand bail upon that appeal, and to detain the ship if bail was not given; and he had a \*right to give up his appeal, upon the opinion of his Euro- [\* 79 ] pean lawyers, without subjecting it to the imputation of being frivolous and insincere. On the part of Mr. Munnings, I see much of that sort and degree of passion which is apt to lead a man up to the very confines of irregularity of conduct. He hesitates about the delivery of his papers, and expresses that hesitation in improper terms. His papers are polluted by very offensive terms, trenching, certainly, upon that decent respect which is due to a court of justice, and clearly attributive either to himself or his agent; add to this his entire inattention to the ship after she is restored, and his

quitting the place without leaving instructions with his agents, from which all these heavy losses have accrued to himself.

Upon the whole, I shall not disturb the sentence by which Captain Purvis was left to pay his own costs in the court below, nor shall I give him the whole costs of the appeal; but I am disposed to allow a particular sum *nomine expensarum*. What its amount may be I shall leave to future inquiry and consideration with the registrar, who will signify it in due time to the parties.

The court pronounced against the appeal, and condemned the appellant in the sum of 130*l. nomine expensarum*.

[ \* 81 ]

\* PARTRIDGE, Betham.

July 25, 1822.

In a dispute between the original owner of a ship and the purchaser, upon a sale by the master abroad, possession decreed upon bail.

THIS was a cause of possession, civil and maritime, promoted by Henry Blanshard, the sole owner of the above ship, against Robert Baxter and others, the asserted proprietors. It appeared that this ship, at the time she left England, in 1820, on a voyage to the East Indies, was, with her stores, worth about 10,000*l.*; and that, having suffered some inconsiderable damage by striking upon a shoal in the bay of Bengal, upon her return voyage, put into Bengal to repair, when the captain, "without any authority whatever, either express or implied, and without any legal survey or condemnation of the ship, and without any cause or necessity, sold her to Baxter & Co. for 2,050*l. sterling.*"<sup>1</sup>

<sup>1</sup> Rule *nisi*, for a prohibition to restrain the Court of Admiralty from proceeding in a cause of possession, discharged.

In an affidavit made on the 23d of June, 1823, in this cause, by Mr. Chatfield, Mr. Blanshard's solicitor, the following circumstances were set forth:—That in Michaelmas term, 1822, Baxter obtained a rule in the Court of King's Bench to show cause why a writ of prohibition should not issue to restrain the Admiralty Court from further proceedings in this cause; and upon Blanshard's appearing to oppose the rule, an agreement in writing was made for the parties, that an action in trover should be brought in the Court of King's Bench, to try their respective rights. On January 7th, 1823, the cause was tried by a special jury before ABBOTT, C. J., when the plaintiff, Baxter, was nonsuited upon the merits, the plaintiff's own witnesses negating the necessity of the

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The Partridge. 1 Hagg.

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\* Upon the arrival of the ship in England, a warrant of [\* 82] arrest issued against her on the 19th July, 1822, at the petition of the original owner;<sup>1</sup> and, on the 25th of the same month, *Jenner*, on behalf of Mr. Baxter, moved the court to decree the ship to be released, upon bail being given to answer the action of the other party. *Lushington* objected to this prayer. He said that Mr. Blanshard was ready to take possession of the ship, and to give bail to the other parties to answer their interests, and in a sufficient sum to cover the freight or earnings of the ship while in his (Blanshard's) possession, provided this court should hereafter pronounce for the opposite interest. The *Peggy*, Finlay, 4 Rob. 304.<sup>2</sup> This proposal was agreed to, and the court decreed Blanshard to have the vessel on bail, to account for the intermediate earnings, and to return the vessel into the hands of the present owners, if the court should ultimately adjudge the possession to them. Bail was accordingly given in the sum of 3,000*l.*; and, on the 15th April, 1823, *Lushington* moved the court to dismiss the bail, and to decree the bonds to be cancelled, in pursuance of an agreement entered into between the litigant parties, "that the bonds given in the High Court of Admiralty for the ship and freight should be given up to be \*cancelled after the [\* 83] trial." This motion being granted, on the 2d July, he further moved that the adverse parties should be condemned in the expenses incurred in this court; it having formed part of the same agreement, "that the costs in the Admiralty Court should abide the event of the trial at law, if the rule in the Court of Admiralty is to give costs to a party succeeding in a cause of possession."

The COURT refused the application. It said there was no positive rule of that kind. A question of costs depends on the merits of the case; and, in the present case, I shall not disturb the harmony of the agreement, but shall dismiss the parties without costs.

Costs refused.

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sale, and also proving that, after the ship was repaired, she went to China with a cargo, and upon her return came to England, with Baxter and his family on board. Evidence was then offered to show that Blanshard had confirmed the sale; when ABBOTT, C. J., in addressing the jury, said, "The single question is, whether Mr. Blanshard has assented to what was done by Captain Betham at Bombay, with the knowledge of all that he had done, so as to ratify and confirm the sale. Without his ratification, the sale is most undoubtedly void." And the jury found that Mr. Blanshard did not ratify the sale.

In Trinity term, 1823, the Court of King's Bench discharged the rule for a prohibition. 2 Barn. & Cress. 244.

<sup>1</sup> See the case of *The Pitt*, *infra*.

<sup>2</sup> See *The Apollo*, Tennant, *infra*.



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The Aid. 1 Hagg.

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AID, Teasdel.

July 31, 1822.

Salvage. The Court of Admiralty has no power of remunerating the mere preservation of life.<sup>1</sup>

JUDGMENT.

LORD STOWELL. It cannot be denied that this is a case in which a liberal salvage remuneration is due. The transaction took place in a dangerous time of the year, in a notoriously dangerous harbor, and was attended with the personal danger of the individuals engaged in it. The ship, which, with her cargo and freight, is of the value of upwards of 6,000*l.* was, on the 20th December, moored in the harbor of Ilfracombe. There was at that time a storm prevailing to a very high degree, such as could not be heightened by any talents of poetic fiction: and it has been described as more approaching to a hurricane than any thing we generally read of on the English coast. \* The harbor is beset with rocks; a number of ships were contained in it, and all the affidavits agree that the ships in the harbor were all set adrift, so that the storm not only carried danger into the sea itself, but into the harbor. The salvors go upon an errand of a very meritorious nature; they are roused from their sleep, and they embark for the purpose of saving life; that is their express purpose — a high ingredient of merit, undoubtedly; and it was clear that there was no prospect, at that time, of any other interest. They go out with immediate danger; their boat is stove between two others, and the men escape by jumping on board one of the crushing vessels. There was, therefore, great danger from several causes, from the collision of the vessels against each other, from the dragging of their anchors, and from the raging of the storm; so that, in some respects, the parties were in more danger than if they had been in the middle of the ocean. There was also, for a time, an abandonment of the vessel. It has not been argued that she was a derelict; but she may be said to have been deserted *sine spe recuperandi*.

The mere preservation of life, it is true, this court has no power of remunerating; it must be left to the bounty of the individuals. But if it can be connected with the preservation of property, whether by accident or not, then the court can take notice of it, and it is always willing to join that to the *animus* displayed in the first instance.

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<sup>1</sup> [See *The Zephyrus*, 1 W. Rob. 329; *The Emblem*, 1 Davies, R. 61.]

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*La Esperanza.* 1 Hagg.

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Here is a property of considerable value, which has received the assistance of four boats and twenty-two salvors. I think I shall act within bounds of moderation if I allow them one tenth of the value, and their expenses.

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\* PRIZE COURT.

[ \* 85 ]

LA ESPERANZA, ———.

November 18, 1822.

Grant of proceeds subject to a scheme of distribution between the captors ; the objections to the proposed scale overruled.

THIS Spanish vessel, with a cargo on board, was captured in the roadstead of Buenos Ayres on the 26th July, 1806. In the month of March, 1812, proceedings were instituted in the High Court of Admiralty against the sum of 2,545*l.* brought into the registry as the proceeds of sale of part of the cargo of *The Esperanza*; and on the 3d June, they were condemned as droits of the admiralty. On the 8th June, 1813, a royal warrant issued, granting to Sir W. C. Beresford the governor, and the garrison of Buenos Ayres, and to Lieutenant Thompson, commanding H. M.'s armed vessel *Neptune*, and the persons acting under him at the time of the capture, one moiety of the said proceeds, and directing the same to be paid to Alexander Fraser, Esq., for the use and benefit of the said parties, on bail being given to distribute the same according to a scheme to be proposed by the agent, and approved by the Court of Admiralty, and subject to the decision of the said court upon any claim of disputed interest between the parties. The scheme of distribution proposed by Mr. Fraser being objected to by Captain Thompson, a monition issued calling upon him to bring it before the court.

The cause was argued upon an act on petition, by *Lushington* and *Dodson* in opposition to the scheme proposed; and by *Arnold* and *Phillimore*, *contra*.

\* JUDGMENT.

[ \* 86 ]

LORD STOWELL. This capture was effected in 1806, and the question arising out of it now comes to be decided at the end of 1822. It struck me as necessary, for the honor of the court, to inquire

how the termination came to be so long postponed. I have the satisfaction of finding that the court is not involved in any just blame for the delay, if such blame exists any where. The transaction took place in the River Plata, in consequence of that ill-fated expedition which occurred in the year 1806, from the Cape of Good Hope to Buenos Ayres and the neighboring Spanish settlement. It was not until the year 1812, that the matter was in any form introduced to the knowledge of this court, by proceedings instituted here for the condemnation of the ship and cargo as droits of the admiralty. The court inquired how it happened that the proceedings took that course, instead of taking that which would have led to a condemnation to the captors, as property taken in a conjoint expedition, like other property before taken in that unfortunate expedition; because its being taken in the roadstead, though that generally entitles the crown in its office of admiralty, has no such effect if taken in a conjoint expedition; but it enures totally to the captors, under the acts of parliament, subject only to the crown's power of distribution according to the royal pleasure. The answer to that inquiry imported that the conjoint expedition was, at the time of this transaction, at an end; and if such were the fact, the answer would be complete. The court has no [ \* 87 ] means of knowing whether the \*expedition was finished with regard to the object which the original purpose embraced.

It is a matter of notoriety, that the expedition was not undertaken by direction of the king's government, but at the discretion of the commissioners, naval and military, at the Cape of Good Hope, acting on considerations of public interest, afterwards confirmed and approved by the crown, but certainly undertaken on the responsibility of those officers, and not defined by any precise description, as far as this court is informed, of its proposed extent. The greater part of the army and navy quitted Buenos Ayres for service against Monte Video, leaving Sir W. Beresford and a garrison of 1,400 men, composed of soldiers and sailors, trained to the use of arms, and acting as soldiers for the occasion. A ship of war, called *The Neptune*, was also left, under the command of Captain Thompson; but drawing too much water for the river, he removed to a smaller vessel, called *The Pegasus*, carrying with him a part of his officers and crew. Whether the secession of this force to Monte Video was such a severance as to constitute a conclusive termination of the conjoint expedition, would depend much upon the extent of objects to which in its original project it was directed. It is now much too late to start that question, because both the parties interested in the present question have consented to institute and continue proceedings on a different basis. They have since applied

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*La Esperanza.* 1 Hagg.

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for the bounty of the crown, and they have argued it upon the construction of the grant which conveys to them the crown's intended bounty. In the apprehension of both, \* therefore, [ \* 88 ] no conjoint expedition existed at the time. Even if this apprehension were erroneous, which I am very far from intimating, it is now much too late for any correction. The construction of the grant upon the facts of the case is the only point which I am at liberty to consider. It seems to have been founded upon a communication of facts that do not appear to be truly accurate.

The grant, as originally stated, describes Captain Thompson as commander of *The Neptune* upon this occasion, whereas he had shipped himself on board *The Pegasus*, a smaller vessel, not mentioned, to which he had appointed himself, *The Neptune* drawing too much water to approach Buenos Ayres. The grant describes Captain Thompson, with the aid of his own men, and of some soldiers, (for so they are denominated, whereas in argument it is contended that they are mere sailors, trained to the use of small arms,) from Lord Beresford, as the person who took possession, as the captor of this Spanish vessel. No prayer is made ; but the king, by the recommendation of the Lords Commissioners of the Treasury, grants a moiety to be divided between the governor and garrison, and Captain Thompson and the sailors, subject to the decision of this court on any question of interest between the parties. A scheme of distribution is brought in by Mr. Fraser, the agent, as I understand, of both parties ; certainly at a striking distance of time after the date of the grant in June, 1813 ; but great difficulties had retarded the business. The transaction was itself remote in the place of its occurrence, and had now become remote in point of date ; the parties concerned in it were distributed in \* various quarters of [ \* 89 ] the globe ; Lord Beresford, a party principally concerned, had been abroad for many years, as is well known, in active employment, both civil and military. Other persons, capable of speaking to the real fact of this remote transaction, were not easy to be procured. These and other difficulties occurred, which were to be surmounted before a necessary investigation could take place. Upon the whole view, it appears, that the delay that has intervened is rather to be regretted than censured.

By the scheme of distribution, the value of the moiety is directed to be apportioned in the usual manner relative to the ranks of the parties, the governor and garrison, and Captain Thompson and the sailors belonging to him. It is, however, contended, on no very definite, or indeed consistent grounds, that it should be corrected by the court's assuming a sort of equitable jurisdiction, and allotting larger propor-

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La Esperanza. 1 Hagg.

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tions to Captain Thompson and to Lieutenant Bishop. It is not denied that Lord Beresford is fully entitled to his allotted share of the prize, and that nothing can be taken from that to increase the portions intended to be enlarged; but it is said that the court may take what is needful from that part of the fund which is allotted to the garrison; for why should the garrison take any thing at all? They were not at this capture, and, therefore, on that ground, could not be entitled to share. To which the plain and conclusive answer is — because it is so directed by the royal warrant. The reference to the court is only to decide on claims of disputed interest; if pretensions are set up by persons claiming, on doubtful grounds, [ \* 90 ] to be considered as coming under the description of \*grantees, this court must decide those doubts, but it cannot exclude those who are nominated and expressly included. If undue proportions relative to individual rank were assigned, the court might rectify that inaccuracy, but no complaint of that kind is broached here. The complaint is, that Captain Thompson and Lieutenant Bishop are very poorly rewarded; to which the answer is, that if the exploit had been the most brilliant in the world, the fund out of which it is to be rewarded is very small; and the reward must arise, not out of the splendor of the exploit, but out of the fund acquired; and even if it could be alleged that the wisdom of those who advised the royal mind must have erred in including those who ought not to have participated, this court could not take upon itself to rectify that mistake. It is bound to pursue the royal mandate, for it has no other authority.

But what are the facts of the case? It appears, that after the capture of Buenos Ayres the fleet and army retired, leaving 1,400 men in garrison in the fort, and the ship Neptune, which Captain Thompson quitted, and shipped himself on board the small vessel Pegasus, for The Neptune was never near the scene of this transaction. A small polacre, under Spanish colors, was seen coming up the river to Buenos Ayres (the wind blowing strongly upwards) by the garrison, who, on sight of her, hoisted, by order of Lord Beresford, Spanish colors on the fort, the usual mode of decoy practised after the reduction of a fort or harbor, in order to invite ships coming in ignorance of the change of possession. The guns of the fort were directed towards her, and she was not only within their reach but [ \* 91 ] \*within that of the musketry on shore. She would have advanced still nearer to the fort and shore, but she was stopped in her course by a musket shot fired by order of Lieutenant Bishop from the Pegasus. And this, it is said, first constitutes a capture, because the court has held, that an act of taking possession was

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La Esperanza. 1 Hagg.

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not indispensably necessary to make a capture; but that obedience to an hostile attack or hostile force, known to be hostile, was sufficient. This court, as is well known, has so pronounced in some signal cases, particularly in the one mentioned by Dr. Lushington, where a vessel armed with a couple of swivels, and with two or three men on board, attacked a much larger vessel, full of men, armed with swords and muskets, and obliged her to run into Ostend, then the port of an ally; and which was held to amount to a capture.<sup>1</sup> Such was the state of that case, — a case of singular merit; but here is direct evidence that no obedience was given to an hostile force knowing it to be such.

Spanish colors were flying on the fort; Mr. Bishop, the officer left on board *The Pegasus*, (for Captain Thompson was on shore,) says, that he had no colors flying but an English man-of-war's pendant. I think this must have been said from want of recollection, because both his interest and duty were in opposition to it. It has justly been described as the usual stratagem of war in such cases to use false colors to deceive the unwary, and if the fort had made the change it was unquestionably his duty to do the like. But it is said that the firing the musket must have apprised them \* of the [ \* 92 ] real fact. Certainly not; for it might import other things; a regulation of police, of revenue, of light duties, or of a proper station in the harbor; for these are things far more probable than that a British ship of war should be lying there, under the protection of a Spanish fort and garrison, for the purpose of capturing Spanish ships that came in; and the fact is proved in the sequel, that they had no such suspicion whatever, and that the stoppage of the vessel was no submission to hostile force or terror, any more than the stoppage of a British vessel coming up the Thames by the firing of a vessel from Tilbury Fort. Mr. Bishop sends no boat on board; whether because Captain Thompson had taken it ashore, or whether the boats of *The Pegasus* were too small, does not appear, but nothing further was then done; and I am clear that, under such circumstances, the capture was not completed.

In the mean time Captain Thompson had observed the Spanish polacre, and applies to Lord Beresford, who was already apprised of that appearance, and had acted upon it, to take his directions, and to beg a proper boat. Lord Beresford gives directions, gives a boat, and gives proper men, soldiers, and seamen used to small arms, and acting as soldiers. No pretence can be supported that the boat was not sufficiently his own. It had been part of the insignia of the Spa-

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<sup>1</sup> Cited in *The Edward and Mary*, 3 Rob. 307.

nish viceroy. He was now the British viceroy commanding there. It therefore devolved on him. He had accommodated Sir H. Popham occasionally with it, to assist in taking provisions to the fleet, but with a reserve for his own occasional use. Sir H. Popham was gone, and it had reverted entirely to Lord Beresford. It

[ \*93 ] \*goes with his garrison in her, never dreaming of any resistance, for there was nothing to encounter but a rough sea and a fresh wind. That was the only danger the boat's crew had to face. The distance from the shore was short, and the peril not worth calculating. The Spanish ship was then taken possession of to the great surprise of the crew, it being satisfactorily proved that they had not the slightest suspicion of a British force being there. The vessel had come from Cadiz, where no news had, or could possibly have, arrived of the capture of Buenos Ayres by the English.

It is not at all material now to inquire whether an escape could have been effected, when it is clear that they knew of no danger from which they should escape. The wind was blowing strong up the river, the great guns were pointed to her from the fort, she was commanded by musketry from the shore; all circumstances were unfavorable to an escape, even if it had been thought of; to say nothing of The Pegasus, which was lying there, bound to prevent it if attempted. Her captain was, indeed, ashore; where her largest boat was does not appear; but her other boats were deterred by the freshness of the wind and roughness of the water. Whether she could, under these circumstances, have pursued with effect, or how far she could have continued a pursuit, upon a coast still remaining in possession of the enemy, it is not material to inquire. As little material is it to refer to a fact introduced by Captain Thompson, that at the recapture of Buenos Ayres in the following August, two British gunboats made their retreat with success under similar circum-

[ \*94 ] stances of weather; but under all other circumstances \*totally different. They were perfectly cognizant of the Spanish force. The British force was compelled to the humiliating necessity of a capitulation, and for that purpose an armistice was proposed and agreed upon. During the armistice these vessels made their retreat, I dare say very leisurely, without any attempt being made to interrupt them; and under such circumstances who can deny that the two cases bear not the slightest resemblance?

Much lamentation has been indulged in on the small reward that Captain Thompson and Lieutenant Bishop will receive for this adventure. The court may entertain a wish that this polacre had been a galleon for the benefit of these British officers; but it has not the power of converting a polacre into a galleon, and petty funds can yield but petty profits. I may be permitted to add, without

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La Esperanza. 1 Hagg.

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meaning the slightest disparagement to the merits of Captain Thompson, that this adventure does not carry with it that degree of splendid merit that can add much to the laurels he has otherwise acquired. Here is a small Spanish merchant-vessel coming to this harbor after a long voyage, coming in under total ignorance of the change that had taken place, manned with a crew proportioned to her size and peaceable character, and on all these accounts incapable of resistance. I do not doubt that Captain Thompson is a man fitted for great and daring enterprises, but this is not an adventure of that class. Here is no room for noble daring, or extraordinary skill and management — nothing of that heroism which confers splendor on undaunted alacrity in meeting a bloody contest. No such danger was or could be surmised. \* The only danger to be [ \* 95 ] contended with is that of the wind blowing fresh and the waves running high, and this to be encountered in a proper boat, manned in an able manner, and at the distance of a musket-shot from the shore. It appears therefore to me, that it needs a strong magnifying glass to see in this action any thing that might not have been done by a set of young men who are members of any of the boat-clubs on the Thames; I cannot see, in this case, any thing so bold as to call upon me to undertake the bolder enterprise of controlling the royal warrant.

Lord Beresford, it is said, acquiesced in the appointment of a naval agent. He did so, and in my opinion most properly, under the supposition he entertained, that possibly the fleet (though absent) under Sir Home Popham might be interested. There had been a severance, it is true, but that might not have produced a legal severance. Gentlemen have said, We do not wish to diminish Lord Beresford's share; we admit that he was the *dux facti* who furnished the instrument of capture, therefore we do not want to touch his share, but that of the garrison. To be sure this is, at any rate, a desertion of the first capture, for with that<sup>1</sup> Lord Beresford had nothing to do. But I am the less disposed to diminish the share of the garrison, because I see that Captain Thompson and the seamen had shared with the garrison in the benefit of a land expedition undertaken nearly at that very date, in which not a seaman was concerned. It appears, that upon the alarm given by the approach of the British force, the public treasure, deposited at Buenos Ayres, had been removed up above fifty miles into the country, to be out of the way of seizure. Almost on the day of the capture, a [ \* 96 ] detachment of the soldiers of the garrison was sent to take possession of this treasure. The expedition lasted nine days; it was

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<sup>1</sup> Supp. 91.



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The Matchless. 1 Hagg.

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attended with much difficulty and danger, but it was executed, and the treasure brought back. In the proceeds of that treasure, the seamen, and amongst them Captain Thompson, were admitted to share, without any question on the part of the garrison, though not a single seaman had shared in the expedition itself. I think, therefore, that Captain Thompson comes with somewhat less grace to require that their share in this business should be reduced to add to his own. Upon the whole, looking at the extent of authority given to the court under the grant, and looking at the equitable construction of the facts, this court will not disturb the scheme of distribution already made.

The Court accordingly rejected the petition, and confirmed the scheme of distribution, and dismissed Mr. Fraser from the effect of the monition.

[ \* 97 ]

\* MATCHLESS, Vint.

December 13, 1822.

Revenue seizure. Various meanings of the word "factor." Considerations as to native character and allegiance.<sup>1</sup>

THIS was an appeal from a sentence pronounced by the judge of the Vice-Admiralty Court of Newfoundland, condemning the cargo of the above-named ship for an alleged breach of the Navigation Laws. The question principally turned upon the second section of 12 Ch. II. c. 18, which provides, "that no alien shall exercise the trade or occupation of a factor or merchant in the plantations, &c."

For the respondents, the *King's Advocate* and *Dodson*.

For the claimants, *Lushington* and *J. Addams*.

#### JUDGMENT.

LORD STOWELL. A seizure was made of the cargo on board this vessel, entering the harbor of St. John's in Newfoundland, on the 7th of April, 1821, by the custom-house officers of that port, on the ground of unlawful importation into that settlement. The cargo consisted of 651 barrels of flour, 24½ barrels of the same article, 200½ bags of bread, 25 barrels of apples, and 2 barrels of nuts, brought im-

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<sup>1</sup> [See the *Harmony*, 2 C. Rob. 322; The *Maria*, 5 C. Rob. 365.]

mediately from Halifax in Nova Scotia. They were libelled in the Vice-Admiralty Court of Newfoundland; and the libel charged that the articles were imported by aliens, and persons not entitled by law to exercise the trade of merchants or factors in Newfoundland; and also that they were imported in violation of several laws there enumerated, some of which have certainly not the remotest application to the case, but are as usual inserted in the libel, either as \*expletives, or to give the seizer the chance of arriving at [ \* 98 ] something that may possibly turn up in the course of the transaction, though not yet visible.

The statutes that are contended to have a real application to the case are, first, the famous Navigation Act, 12 Ch. II. c. 18, which in section 2, directly forbids importation by aliens and persons not entitled to exercise the trade or occupation of merchants and factors in the plantations; and next, the 28 Geo. III. c. 6, which, in sections 12 and 13, provides that no commodities shall be imported into the island of Newfoundland from the United States, except in particular cases of distress. Claims have since been made for the goods on behalf of different owners; one for 400 barrels of flour, 24½ barrels of the same article, and 200½ bags of bread, as the property of Millidge, described as late of St. John's in this island, but at present residing at Boston, in the United States, and another claim for 251 barrels of flour, as belonging to Reynolds & Co. of Halifax. The apples and nuts are also claimed, but referred by the court to another judicature, namely, to the judgment of the Court of Session, and are, therefore, not worth consideration. The two claims, which the Vice-Admiralty Court then disposed of, are the subjects of the appeal now depending here. I see no sufficient reason to question the property as described in the two claims. No objection whatever has been stated to the claim on behalf of Messrs. Reynolds & Co. of Halifax, and that claimed by Millidge is expressly and formally admitted by the seizing officer to be his (Millidge's,) property. If it was even at all questionable in fact, it is a question now closed against the seizer and those who represent him. He is not at liberty to raise the question in \*the face of this unrestricted admission. And I do [ \* 99 ] not see any legal question that can fairly be raised on the importation of any part of this property into Halifax — that is a by-gone matter, not examinable at present. It might have been done fairly and regularly under the existing laws; and having been done, it must now be presumed, without looking further, to have been done legally, nothing appearing to the contrary.

These questions being dismissed, the case remains subject to two other questions; one of them extending to the whole of the property

claimed, the other only to that which is claimed by Millidge. The question, which concerns the whole of the property, arises out of the fact that a person of the name of Cheever, of an American character, was charged to have been employed as a factor on board this vessel in the transportation of all the goods. This question mainly turns upon the meaning of the word factor; for it has not been contended that he is not an American, although he certainly had done a great deal to clothe himself with a British character; he had actually resided in Newfoundland, first as a clerk, and afterwards as a merchant, from 1805 to nearly 1820 — had served in the military corps of the island — taken the oaths of allegiance and fidelity to his late Majesty, and had never taken the oaths to any other state, and had only quitted the island in consequence of insolvency in his mercantile concerns. But having been born in America, and having returned to Boston to carry on his mercantile concerns, I think it is rightly judged and admitted, that his native American character [\*100] had reverted \* upon him, and that he is legally deemed an American.

The only question then that remains, is, whether in this transaction he acted as a factor. I have looked to find the word factor as used in the statute, legally and authoritatively defined. The word "Factor" is not a term of the civil law; it is not to be found in the language in which that system of laws is written. I believe it has a French origin in the word "Facteur," and, in common parlance, it continues in a sense of great latitude to signify any agent whatever. In the northern district of this island, it is very generally applied to land-stewards, bailiffs, and managers of estates. It appears also to have a frequent reference to a residence in foreign countries, (whence the word factory is derived,) signifying a collection of persons residing abroad in foreign stations for the sale of commodities sent to them from their native countries, which they are to dispose of either as actual partners in the house of trade which sends them, if they are partners, or as independent factors selling upon a certain commission, without sharing in direct profits; and I observe that this notion of a foreign residence runs very much through the observations of Postlethwaite, a very accurate writer on commercial subjects; though it is not absolutely essential, for a factor may reside not only in the same country, but in the same town with his employer. In sea-port towns, where there are great manufactories, besides the great manufacturers themselves, there may be factors to export upon commission; a very great part of the commerce of this great town is conducted on foreign goods imported, and our own manufactures to be [\*101] \*exported. But I take the real and established distinc-

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tion in our statutes to be, that a merchant buys and sells for his own direct mercantile profit, and the factor only buys or sells upon a commission; and that when the merchant and factor are in any statute contra-distinguished and opposed to each other, as in the Navigation Act, that is to be the sense attributable to each distinction respectively.<sup>1</sup>

If this be so, then it reduces the question here to the single point, whether Mr. Cheever was sent out to sell these goods upon commission. His going along with the goods proves little. He may be a mere supercargo, who has the care of the goods for stowage and safety in the transit and final delivery. To be a factor, he must be empowered to sell by commission; and if not so empowered, he is not a factor, whatever else he may do. If the supercargo is not to sell or receive a commission or share of commission for the sale, he has not the proper distinguishing feature of a factor. The consignee, to whom the goods are to be delivered for sale, is the factor, if any; and with respect to the goods claimed by Reynolds & Co. of Halifax, it is quite clear that Cheever was neither consignee nor consignor of those goods. They were the consignors themselves; and Stewart & Co. the consignees; and they were, as Stewart has sworn, to have the whole benefit of the commission. Nothing whatever connects Cheever with these goods, except the mere act of [\* 102] admitting them on board a ship which he had chartered.

They were goods lying in a merchant's store at Halifax; how long they had been there does not appear, nor where they originally came from; nothing points to an American origin. They were shipped by Hart and Robinson, merchants there, and consigned to their partner Stewart at Newfoundland. Cheever does not appear to have been supercargo of these goods. In what sense can he be considered as their importer? The importer of goods is the consignor, who sets the adventure afloat, who directs the port to which, and the person to whom it is to be delivered, and who can stop the goods *in transitu*. He has no possession of these goods, nor is he the importer or factor. I am therefore under the necessity of reversing this part of the judgment.

Cheever, certainly, stands much nearer to the goods of Millidge. He attended them from Boston in the ship Cherub to Halifax, where they were transhipped into this vessel to be carried to Newfound-

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<sup>1</sup> See, upon the subject of the term "Factor" and mercantile agency, Bell's Commentaries on the Laws of Scotland, vol. i. 385. *Hutchins v. Player*, (decided by Sir O. Bridgman,) Bannister's Reports, pp. 299, 306, also 6 Geo. IV. c. 94, amending 4 Geo. IV. c. 83, as to "Principal and Factor."

land. He attends them, but not as factor; for the consignee, Brook-  
ing, a partner in the house at Halifax, swears positively that he was  
not to receive any share whatever of the commission on the goods  
that were so sent. It was to be regularly claimed by the house, and  
received fully and fairly by them. The powers which he exercised  
certainly prove a great delegation of authority, if it was mere delega-  
tion, for they assuredly lead to a suspicion of part ownership. That  
suspicion is, however, ousted by the admission of the seizor; and  
these authorities, ample as they are in their extent and exercise, will  
not constitute him a factor in the statutable meaning of  
[ \* 103 ] \* the word, if there is a consignee empowered to receive and  
sell the goods, and put into his own pocket the whole of the  
commission. He may be an active instrument in the transaction;  
but it is in another character than that of factor; and it is in that  
character alone that his contact with the adventure will condemn the  
property. I therefore dismiss that ground of condemnation respect-  
ing Millidge's goods; but his claim is attacked on other and stronger  
grounds.

Mr. Millidge is described in the claim as a British-born subject, but  
at present residing at Boston. He is described by the judge as resid-  
ing with his family there, and he appears in this transaction as ex-  
porting goods thence. Not a word has been produced to show that  
he is not a settled merchant in that city, a fact which, if untrue, might  
have been contradicted by the whole population of Newfoundland,  
where he had resided for some years before his removal to America.  
A question then arises of great moment, regarding as well the inter-  
ests of a state as the interests of its subjects. Is such a person to  
be considered a merchant of Great Britain, or a merchant of Ame-  
rica? Upon such a question, it has certainly been laid down by ac-  
credited writers on general law, and upon grounds apparently not  
unreasonable, that if a merchant expatriates himself, as a merchant,  
to carry on the trade of another country, exporting its produce, paying  
its taxes, employing its people, and expending his spirit, his industry,  
and his capital in its service, he is to be deemed a merchant of that  
country, notwithstanding he may, in some respects, be less favored in  
that country than one of its native subjects. Our own coun-  
[ \* 104 ] try, which is charged \* with holding the doctrine of unextin-  
guishable allegiance more tenaciously than others, is no stran-  
ger to the application of this rule. Its highest tribunals, which adjudicate  
the national character of property taken in war, apply it universally.  
They privilege persons residing in a neutral country to trade as freely  
with the enemies of Great Britain in war, as the native subject of  
that neutral country, although our own resident merchants cannot,

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without the special permission of the crown ; and they confiscate the property of an English subject resident in an enemy's country as freely as that of the native subject. An ancient statute, passed after the principles of commerce began to be cultivated and favored, the 14 & 15 Hen. VIII. c. 4, evinces a regard to this rule. The enactment itself goes only to the payment of dues ; but the preamble goes much farther, tending to a recognition of an alien character belonging to a British merchant carrying on trade in a foreign country, without being a member of a British factory there, and preserving to him, under certain ordinances, the benefit of an entire British character.<sup>1</sup> Various strong authorities, both in *dicta* and decisions, incline the same way. Lord Alvanley, in a case reported in Bosanquet & Puller, declared that it had been held that a British subject, resident in a foreign country, is entitled to all the privileges of the neutral nation whilst he resides in it.<sup>2</sup> Lord Kenyon has also declared that persons residing in this country must, for the purposes of trade, be 'considered as belonging to this country.'<sup>3</sup> In the still [ \* 105 ] stronger case of "Wilson v. Marryatt,"<sup>4</sup> it was settled that a British-born subject residing in America might trade to the East Indies, though a British subject could not. And surely, if the acquired residence takes off the British incapacities, he has no right to complain if it fixes upon him some disabilities of its own. Under the shelter of these authorities, I should incline to hold, if I were compelled to face the general question, that a British merchant, resident in a foreign country, must part with some commercial privileges which he would preserve if resident at home, whilst he acquires others by residence abroad. But it is not necessary for me to go farther than to deliver the result of my consideration of the present matter, which is that Mr. Millidge must, in this transaction, be taken as an American, and not as a British merchant. If so, it is clear that he can do whatever an American merchant can do, and clearly not more.

Then comes the question, Could an American merchant send from his port at Boston a cargo on his own account, to be imported into Halifax, and thence to be re-exported to Newfoundland, where it was seized ? As to this part of the case, the *onus probandi* is in some

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<sup>1</sup> See the Ship's Registry Act, 6 Geo. IV. c. 110, s. 18.

<sup>2</sup> *McConnell v. Hector*, 3 B. & P. 114.

<sup>3</sup> *Tabbs v. Bendelack*, 3 B. & P. 207 (a.) See also Stewart's Reports of Sir Alexander Croke's Judgments, pp. 58, 59.

<sup>4</sup> 8 T. R. 31 ; 1 B. & P. 430.

degree shifted. Upon all matters of fact, it is made by statute to lie entirely on the claimant. He must prove the facts which he conceives necessary to his defence. It then lies upon the prosecutor to show that those facts, if proved, do not prove an innocent [ \*106 ] transaction; for \* that it is prohibited by some of the numerous statutes he has stated in his libel. For all these prohibitions are by positive enactment. We talk of the colonial policy as exclusive, and so it is; but it is so because it is so made by positive regulations, directly or inferentially; for there is nothing in the origin or constitution of a colony that excludes from its shores, more than from those of the mother country, till that country has ordained what is to be the condition of the colony. When, therefore, it is contended that the facts proved do not compose an unprohibited case, the particular ordinance must be shown against which it is conceived to offend directly or indirectly. It is certainly most devoutly to be wished that these ordinances could always be so framed as to present obvious and definite meanings. But it is not easy to effect this desirable purpose. They are multitudinous parts of wide systems of regulating policy, embracing a vast variety of objects, and often produced by the pressure of particular events, at distinct periods of time, and under great diversity of existing circumstances. It can be no matter of surprise if some things like obscurities and contradictions intervene, which may be extremely difficult to clear up, or to harmonize by subsequent interpretation.

The points have been carefully argued; but I wish to obtain a more distinct apprehension of one or two questions. Is it contended that an American could not go direct to Newfoundland with such a cargo? — and is it on the other hand contended that he could? If he could go there direct, then that right was not weakened by a transshipment in another British port, to which he had gone, to try the market there. On the other hand, if he could not go there [ \*107 ] \* direct, I should find great difficulty in persuading myself that he could acquire that right by going and transshipping at an intermediate port. Now the solution of that point depends upon the just interpretation of two statutes, one the 28 Geo. III. c. 6, s. 12, and the other the 58 Geo. III. c. 19. These statutes are in apparent contradiction, if both are existing in full operation. The practice of the custom-house at Halifax has varied, as it regards this latter statute. At first they admitted goods from the United States, without inquiring whether British property or not. Upon further advisement, they exacted from the importer an oath that no alien had any interest in the goods so imported. Complaint was made by the

merchants to the government here ; and, upon the concurrent opinions of the law officers of the crown, an order was given to discontinue the practice. Of course, the Americans imported freely ; but the custom-house there went further in its relaxation, for it permitted not only the importation, but the exportation also, grounding itself, I presume, upon the fact that the clauses in the 58 Geo. III., respecting importation and exportation, were precisely the same, and that if one was permitted, the other was also permitted in the same extent. Accordingly this very ship was cleared out at Halifax for Newfoundland without scruple, although, in a case immediately following, it appears that they refused to permit the exportation to Newfoundland, unless the property was sworn to be not American. It must be admitted that the identity of the two clauses in point of terms cannot be disputed. But is the Prohibition Act respecting importation at Newfoundland repealed? For if \*not, whatever [ \* 108 ] might be said of clearances to other possessions of his Majesty, the clearance to that port is unlawful. No permission of the governor existed ; and if it did, it could not license this importation.

The present question respecting Millidge's restitution will essentially depend upon this, whether the prohibition of importation to Newfoundland is taken away by this latter act. A very few words inserted in it would easily have ascertained the meaning in the view that I take of this question. I say nothing of clearances to other colonies, where no such prohibition exists. It rather strikes me as difficult to maintain that, if no such prohibition exists in the port *ad quem*, it is prohibited in the port *a quo*. The importation there, and the exportation thence, are put upon the same footing ; the one is a literal transcript of the other, and I do not feel myself authorized to give them a totally different meaning. The crown, acting upon the advice of its law officers, has given an authoritative meaning to the first, and that, I incline to think, must be attributable to the other. But I do not decide that point, nor how far it may be advisable, if considerations of public policy or commerce, into which I do not enter, should so render it, to remove any ambiguity on that matter — a matter certainly of no small extent. At present, I am only called upon to say whether this importation into Newfoundland is illegal ; and I am of opinion, that, unless it can be maintained that the 28 Geo. III. is in effect repealed by the 58 Geo. III., that property must stand condemned.<sup>1</sup>

<sup>1</sup> This was ultimately decreed, with 40*l.* *nom. exp.* to the successful appellant, p. 102. The 28 Geo. III. c. 6, and 58 Geo. III. c. 19, are repealed by 3 Geo. IV. c. 44. See



[ \* 109 ]

\* DUNDEE, Holmes.<sup>1</sup>

January 28, 1823.

The fishing-stores of a vessel engaged in the Greenland fisheries held liable to contribute in compensation for damage done to another British ship ; such stores being considered appurtenances within the meaning of the 53 Geo. III. c. 159, notwithstanding that the first clause of the act mentions only ship and freight.

The mode of initiating a suit by arrest of ship, tackle, &c., is the ancient formula of the court.

THIS ship, of which Mr. Gale was the sole owner, being bound on a voyage to the Greenland fisheries, sailed from the port of London on the 7th of March, 1820 ; and on the 9th of the same month, as she was going down the River Thames, she came in collision with a Berwick smack, The Princess Charlotte : the smack almost immediately sunk, and, with the whole of her cargo and fishing apparatus, was lost. The Dundee lost her bowsprit, and being otherwise damaged, she put into the port of Harwich to refit. She was there arrested, by the usual warrant for that purpose, on the part of Andrew Laurie, Thomas Gilchrist, Thomas Hill, John Wilson, Robert Marshall, and others, trading under the firm of the Berwick Old Shipping Company, as owners of the ship Princess Charlotte, in a cause of damage civil and maritime. The action was entered in the sum of 9,000*l.*, against the ship, her tackle, apparel, and furniture. Independently of these sailing stores, which are necessary for the general purposes of navigation, The Dundee had on board boats, fishing-tackle, such as harpoons, lines, and rockets, casks, and various other implements, commonly termed fishing-stores ; and a question being raised as to the liability of the owner of The Dundee (for the loss that had been incurred by the owners of The Princess Charlotte) beyond the value of "the ship, her tackle, apparel, and furniture," it was agreed, that separate valuations should be made, and [ \* 110 ] the point \* reserved as to the quantum of liability, until it was ascertained whether The Dundee was in fault. The ship, her tackle, &c., &c., were valued at 2,685*l.*, and her fishing-stores at 2,236*l.*, and bail was given in the sum of 9,000*l.*, being the full extent of the action, warrant, and arrest, but with the express condition

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also the consolidation of the navigation laws in 3 Geo. IV. cc. 42, 44, 45, and 6 Geo. IV. c. 109, and the able treatise of Mr. Holt, 2d edition, p. 1, c. 1.

[<sup>1</sup> Reported again in 2 Hagg. Ad. R. 137.]

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The Dundee. 1 Hagg.

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that it was without prejudice to the question of the owner's liability beyond the appraised value of the "ship, her tackle, apparel, and furniture." On the 4th December, 1821, the judge of the High Court of Admiralty, assisted by two of the elder brethren of the Trinity House, decided, that The Dundee was the wrong-doer, and condemned her owner and the bail in the amount of damage, and in the costs sustained by the owners of The Princess Charlotte; and referred the accounts and vouchers to the registrar and merchants to assess the amount of damage, and to report accordingly. The registrar reported the amount of damage at 4,544*l.* 12*s.* 6*d.* An objection was taken to this report in order to ascertain the extent of the owner's liability under the 53 Geo. III. c. 159, "to limit the responsibility of ship-owners," and also under the instruments upon which the action was commenced. The circumstances, on both sides, were set forth in an act on petition.

For the owner of The Dundee, *Adams and Jenner*. The court has decided that The Dundee was the wrong-doer; not owing to any particular wilfulness of misconduct on her part, but owing to another vessel coming between The Dundee and the smack that was unfortunately lost. An action was entered in the usual way, against the ship, her tackle, apparel, and furniture, and the warrant was extracted in the same form. Bail \* was afterwards given to [ \* 111 ] the full amount of the action, but with an express reservation as to the liability of the fishing-stores. The fishing-stores have been appraised at the sum of 2,236*l.*; but the whole of the value of the ship, her tackle, apparel, and furniture, was estimated at 2,685*l.*; as to this latter sum there is no dispute; and we deny our liability beyond it, and the registrar's report exceeds the value of the ship and her sailing-stores, but does not amount to the aggregate value of the ship and her fishing-stores. We do not object to any particular items of this report, but our objection is general,—on the ground that our liability does not extend to the loss sustained by the owners of The Princess Charlotte, but is confined to the value of The Dundee, her tackle, apparel, and furniture.

The nature of the action—the warrant and actual arrest are the first things to be regarded: and it so happens that the language in all the instruments is the same: it describes this proceeding as "against the ship, her tackle, apparel, and furniture." This certificate of the due execution of the warrant is to the same effect. It will not then be contended, we presume, that fishing-stores can be reached under those terms. Bail, it is true, has been given; but it must be taken to be only co-extensive with the action itself; it will

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not go beyond the value of the thing to be released. The object of giving bail was to effect the release of that to which the action itself had been limited, viz., "the ship, her tackle, apparel, and furniture." But an extended construction of liability is set up in this case; and it is alleged, that there exists an agreement, voluntarily [ \*112 ] made by our own agents, which \*carries the liability of the owner of The Dundee further than the warrant of arrest limited, as this was, in its form and description, to the ship, her tackle, apparel, and furniture. What is the history of this agreement? Mr. Gale, the owner of The Dundee, employs two gentlemen to attend at Harwich upon the release of his ship; the person, in whose custody she was, refused to give her up, without an undertaking in writing for bail to the action and arrest, according to the value of The Dundee as she then lay in harbor. They consent to give it, in order that the fishing season might not be lost. The agreement recites, that an action was entered "against The Dundee, her tackle, apparel, and furniture," and then undertakes that "bail shall be put in and perfected in this cause to the amount of the value of the said ship and appurtenances." Upon this last word much of the argument must necessarily turn. But can it be said, that considering where it is found, the term can embrace more than was expressed by the preceding phrase in the heading? It is the adoption of one single word to comprehend the ship, tackle, apparel, and furniture. It is a short mode of expression to prevent repetition. What inducement could these gentleman have to extend the owner's liability beyond the amount itself of the ship, her tackle, &c., &c.? Why should they have gone beyond the actual action? Certainly, a person may engage to give a larger gratuity than what the law requires; but that has not been done here. They adopted a word strictly confined to the language used in the heading of the agreement; such was their view of the matter; and the adverse [ \*113 ] parties themselves \*seem to have put the same construction upon the agreement, till they wrote to the act on petition. A modern statute, the 53 Geo. III. c. 159, is extremely applicable to the argument; and the court itself alluded to it in the recent case of The Carl Johan.<sup>1</sup> It then remarked, "that anciently the owners were, under the general law, civilly answerable for the total loss occasioned by the negligence or unskilfulness of the persons they employed; but the avowed purpose of the relaxation of this rule of law

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<sup>1</sup> Case of a British vessel run down by a Swedish vessel, decided November 20th, 1821. MS. [See a fuller report in The Girolamo, 3 Hagg. Ad. R. 186.]

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was to protect the interests of those engaged in the mercantile shipping of the state, and to remove the terrors which would otherwise discourage people from embarking in the maritime commerce of a country, in consequence of the indefinite responsibility which the ancient rule attached upon them. . It was a measure evidently of policy, and established by countries for the encouragement of their own maritime interests." And the court held, in that case, that it was a law as to British ships, but not as to foreign ships, nor for foreign owners. They then adverted to the act itself, intituled, "An act to limit the responsibility of ship-owners," and recited the preamble, and the acts there enumerated, and argued upon the force of the clause, "that no owners, or part-owners, of ships shall be subject to answer for any damage done to other ships without their fault, further than the value of their own vessel, and the freight due or to grow due for and during the voyage which may be in prosecution, or contracted for, at the time that the loss or damage may happen." In this case, the value of \* the responsibility is [ \* 114 ] confined to the ship, as no freight was earned. The voyage was altogether most disastrous.

When the present transaction took place, the act of the 53 Geo. III. had long passed; it was familiar to all ship-owners; and if the word "appurtenances" (as we contend) did not apply even before the act, it is much less capable of receiving such a construction afterwards. The act, it is true, uses the word in many of the subsequent sections (in the 7th, 8th, 10th, and 13th). It is, however, only used to prevent repetition, and in those parts of the act which contain directions as to proceedings in equity; but in the enacting part, the part which is most important, and which specifically relates to the liability of owners, it is not used. In the passages in which it is to be found, it is evidently used in the same sense which it was intended to bear in the agreement, where it was adopted to prevent the too frequent recurrence of the words "apparel, tackle and furniture." The first section, as far as bears upon the present question, limits the liability of the owner "to the value of his ship, and to the freight due or to grow due." The second section puts a construction upon the word freight, and it embraces the carriage of goods belonging to the owner, and also the hire of the ship in case she is sailing under a contract. And it was a proper provision of the legislature, that the price of the carriage of such goods should go to the freight; as, in owner's goods, there is nothing that can be considered as freight, in the strict sense of the word. What an incongruous construction it would be after this to say, that the actual value of the cargo, and not the mere freight \* of it shall contri- [ \* 115 ]

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bute. The goods themselves are not to be included incidentally, when their hire is provided for in direct terms. But, independently of the construction of this statute, the word "appurtenances" can, in no strict legal interpretation, be said to go beyond a thing inseparably and necessarily connected with it; and they argued that 53 Geo. III. c. 159, was of large and general operation, and that it was unsafe for the court to construe it according to a particular voyage, and the particular course of trade in which a ship happened to be engaged, so as to subject goods on board, as appurtenant to a ship, to be within the intention of the legislature. Whatever damage, therefore, The Dundee has done, she must compensate it on the same principles of responsibility that would apply to any other British vessel. She should be viewed not as a Greenlander, but as a navigating ship, and fishing-stores are not necessary for a ship's navigation. The appurtenances are only what is absolutely necessary for a navigating ship, and not for her incidental trade; they do not include the means taken on board for the success of that trade. Suppose a wine ship, or a ship in the African trade, or a vessel outward bound in search of a cargo of dyeing woods; — the staves and casks taken out for the reception of the homeward cargo, or the articles of barter, could never be claimed as appurtenances, more especially under the restricted liability of an owner in virtue of the different legislative enactments. And there is no more necessary connection between fishing-stores and a vessel in the Greenland trade, than between ships and the articles just mentioned. Again, fishing-stores [ \* 116 ] are always separately insured, since it has been \* held, in the case of a Greenland ship, that they are not within a policy of insurance, "for ship, tackle and furniture." *Hoskins v. Pickersgill*.<sup>1</sup> This shows what the common acceptation of the term is in the usage and understanding of merchants. Neither would they pass in a conveyance. The *dicta* of maritime writers, which are collected by Mr. (now Lord Chief Justice,) Abbott in his work on Shipping,<sup>2</sup> "that a ship's boat would not pass by a conveyance of a ship, her tackle, &c." go further, perhaps, than the law of this country would, because our printed forms of bills of sale mention "boats, oars and appurtenances whatsoever to the ship appertaining;" but no one can say, that upon the sale of this ship in the ordinary manner, her fishing-stores would be included in the word "appurtenances;" they do not appertain of necessity to the ship; they are the proper

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<sup>1</sup> Park on Insurance, p. 97, 7th Ed. Marshall on Insurance, p. 735, 3d Ed.

<sup>2</sup> P. 8, 8d Edition.

appurtenances of the cargo, and are the means and instruments of providing a cargo and sending it home. Fishing-stores are not, therefore, strictly and properly appurtenances to the ship, though, without them, it might be difficult to furnish a cargo. Supposing this ship had been chartered for the voyage, these articles would not then have been furnished by the ship-owners; could they, in such a case, have been made liable to contribute in compensation? They then referred to Blackstone's Commentaries<sup>1</sup> for the meaning of the word "appurtenant," when used in the sense of "common appurtenant," showing, that it clearly signified a \* thing [ \* 117 ] which is absolutely inseparable from the freehold, being claimed in right of it by immemorial usage and prescription. So again, with respect to a seat or pew in a church, claimed as appurtenant to a dwelling-house. Appurtenances, therefore, both in the language of the Act of Parliament, and according to all legal understanding of the same word, must be taken to mean, not any thing which is in a manner accidentally connected with another, but something so inseparable from it, that it can hardly be taken away without destroying it. Now, if you take away the masts and rigging of a ship, you destroy the thing; she is no longer a ship — she is a mere hull; but if you take away the fishing-tackle, it is not so; she is still a navigable ship. The fishing-tackle was only accidentally on board; it is not necessarily so; and the case is to be considered not *quâ* *Greenlander*, but as a navigating ship. A doubt may even arise as to the jurisdiction of the court, in regard to this fishing-tackle. The action is against a specific thing; bail is given to the action for it; the jurisdiction is *in rem* — what is the *res*? — "the ship, her tackle, apparel and furniture," and their proceeds, the representative of the *res*. The bail, however, being given for a specific thing, it can in no way contract or extend the legal responsibility, any more than the undertaking for the bail.

*Arnold and Lushington, contra*. By the general law, owners were responsible for any loss or damage occasioned by their ships, or by those who were intrusted with their management. This general liability has been limited by several acts of parliament.<sup>2</sup> The 7 Geo. II. c. 15, provides that, in cases of embezzlement by the master or mariners, of any goods on board, the liability of [ \* 118 ] the ship-owners shall be confined to the value of their ship and freight. The next act is the 26 Geo. III. c. 86, which extends

<sup>1</sup> Vol. ii. p. 32, Coleridge's Edition.

<sup>2</sup> *Supra*, 113.

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the former provision, in diminution of their liability, to acts of embezzlement done by other persons on board, without the privity of the owners, and in which the master or mariners shall not be concerned. A further relief is given by the provisions of the 53 Geo. III. c. 159, by which the preceding limitations are extended to other cases of loss. These statutes, however, being in limitation of the general law, their effect is not to be extended beyond the fair construction of the terms they adopt. The terms of the enacting clause of the 53 Geo. III. are to be taken with reference to the 7th, 8th, 10th, and 13th clauses of the same act, in which the responsibility of the ship-owner is treated as limited "to the value of the ship with all her appurtenances and freight;" and we contend that the word "appurtenances" must be taken to include all that is absolutely necessary for the particular ship that occasioned the damage, and the voyage she was at that time pursuing. We are not introducing an arbitrary interpretation of the words "ship and freight," because the interpretation is given in the subsequent sections of the act itself, particularly in s. 7, where certain proceedings are marked out in case the vessel, with all her appurtenances, and the amount of the freight, shall not be sufficient to make full compensation to all injured parties. This and the other sections referred to plainly show, that appurtenances are included in the phraseology of the earlier sections, and [ \* 119 ] declare the extent to which those terms \* will go. The ship was solely equipped and fitted out for the Greenland fishery, and was, at the time she caused this serious damage, on a fishing voyage to Davis's Straits; her fishing-tackle was on board, and must be considered as part of her appurtenances; and when the ship was released at Harwich, an engagement was made, by persons duly authorized by the owner, that bail should be given to the amount of the value of the ship and appurtenances. The form of process that was used upon the arrest of the vessel, was that which is the only and ancient formula of the court. The action was entered and the warrant was decreed in the ancient and recognized form, namely, against the ship, tackle, apparel, and furniture, and bail is put in following the same expressions. It was under this form of process that the general responsibility of the ship-owner was enforced, before any legislative interposition. These are the forms and instruments that were in existence and use under the general law; and they extended to the owner's general liability. If, then, they included the whole liability, they will necessarily include that which is left of the whole. The case of *Hoskins v. Pickersgill*, that has been cited, is not applicable; for the construction of policies of insurance is always arbitrary; and it does not appear that, in that case, the word "appurtenances"

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was used, so that if it had been used, there is nothing to show that fishing-lines would not have been included. In *Brough v. Whitmore*, 4 T. R. 206, the word "furniture," in an action on a policy of insurance upon an East India ship, and on the tackle and furniture of the ship, was held to include the stores and provisions which were for the use of the ship's crew.<sup>1</sup> The custom of mer- [\* 120 ] chants, therefore, with regard to the construction of policies of insurance, is apparently too uncertain to assist in the right determination of this question.

#### JUDGMENT.

**LORD STOWELL.** The question which the court is now called upon to decide arises out of an unfortunate case, in which it appears that the ship *Princess Charlotte* was run down and sunk by the Greenland whaling ship, *The Dundee*, then bound on a fishing voyage to Davis' Straits, and totally lost and destroyed, not certainly with any purpose of such destruction, or indeed with any purpose of injury, whatever, for that would have required a consideration of a very different kind, but from a want of that attention and vigilance which is due to the security of other vessels that are navigating on the same seas, and which, if so far neglected as to become, however unintentionally, the cause of damage of any extent to such other vessels, the maritime law considers as a dereliction of bounden duty, entitling the sufferer to reparation in damages.

The *quantum* of reparation due in such cases has been differently measured in the maritime laws of different commercial countries, and of the same commercial country, amongst others our own, at different periods. The ancient general law exacted a full compensation out of all the property of the owners of the guilty ship, upon the common principle applying to persons undertaking the conveyance of goods, that they were answerable for the conduct of the [\* 121 ] persons whom they employed, and of whom the other parties who suffered damage knew nothing, and over whom they had no control. To this rule our own country conformed; and it is not to be denied that the term compensation is not very accurately applied to any restitution that falls short of a fair and full indemnification for the injury done. But Holland having introduced a law for the protection of its navigation, that persons interested in it should not be liable

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<sup>1</sup> In the United States, a policy on the ship is understood to extend to the sails, rigging, tackle, furniture, boat, and provisions. *Phillips on Insurance*. Boston, (U. S.) 1823.



beyond the value of that property of their own which they exposed to hazard — their ship, freight, apparel and furniture. England followed in successive statutes, by which it protected owners from responsibility beyond those interests, first in the case of embezzlements committed by some of the crew of the ship herself;<sup>1</sup> and, in a succeeding statute,<sup>2</sup> this protection was extended to the case of embezzlements committed by other persons. The legislature proceeded, in a later statute,<sup>3</sup> to give the same protection in the case of all losses otherwise produced. The latter statute, which most immediately applies to the present question, in the first enacting clause, subjects the ship, tackle, apparel, and furniture, and its freight, but in the following clauses, particularly the 7th and 8th, the word *appurtenances* is introduced, and is repeated as subject to contribution. Now these latter clauses must be considered as explanatory of the first clause, proving that the obligation of that clause, though briefly expressed in its own terms, was intended to embrace whatever could be fairly considered as the \* appurtenances of the ship. It cannot be supposed that these following clauses introduce any inoperative word totally without meaning; and they can have no meaning unless they are understood to be virtually incorporated in the first clause, and to derive an operation from it. If not so, they are either totally unmeaning, or they must stand in direct contradiction to the enacting clause, if that clause confines its own intended meaning to the ship and freight only, and these other clauses carry it to other subjects. The word cannot be considered with any propriety as the intrusion of a new, distinct, and distant subject. A cargo cannot be considered as appurtenances of the ship, being that which is intended to be disposed of at the foreign port for money, or money's worth vested in a return cargo. Its connection with the ship is merely transitory, and it bears a distinct character of its own. But those accompaniments that are essential to a ship in its present occupation not being cargo, but totally different from cargo, though they are not direct constituents of the ship; (if indeed they were, they would not be appurtenances; for the very nature of an appurtenance is, that it is one thing which belongs to another thing); yet if they are indispensable instruments, without which the ship cannot execute its mission, and perform its functions, it may, in ordinary loose application, be included under the term ship, being that which may be essential to it, as essential to it as any part of its own immediate machinery.

The appurtenances here particularly charged as liable to contribute,

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<sup>1</sup> 7 Geo. II. c. 15.

<sup>2</sup> 26 Geo. III. c. 86.

<sup>3</sup> 53 Geo. III. c. 159.

are the fishing-stores, valued by the merchants at Lloyd's at 2,236*l.* the ship being valued at 2,685*l.*, and being equipped for a 'whaling voyage to Davis' Straits. The owner of the ship, [ \* 123 ] who is charged with the injury, contends, that these fishing-stores are protected from all liability to contribute, first, by the mode in which the suit commenced by an arrest of the ship, tackle, apparel, and furniture only, without including the fishing-stores; for it has been argued, that fishing-stores cannot be considered as furniture, inasmuch as it has been determined, on the authority of the case of *Hoskins v. Pickersgill*, which was quoted, that they are not entitled to be so considered. It is a case to be found in two or three works, stated concisely,<sup>1</sup> but more fully in Mr. Serjeant Marshall's book on Insurance.<sup>2</sup> He observes, that the usage of trade often controls the general construction of the policy; and what shall or shall not be protected as a part of the ship and furniture, depends, in some cases, on the usage of a particular trade. As, where an insurance was made on a Greenland ship, and in an action on the policy, the question was, whether the fishing-tackle was included in the insurance on the ship and furniture, Lord Mansfield said, "there was no doubt that boats, rigging, and stores belonging to the ship were included; and as to the fishing-stores, it must depend on the usage of trade." Contradictory evidence was given on this; the jury found for the plaintiff; but the court afterwards set aside the verdict, on the ground that the evidence of usage was principally for the defendants.

\* In this case, then, it was finally decided, and upon the [ \* 124 ] best authority, that of the court itself, though after much contradiction of evidence, and a verdict given by the jury the other way, that by the usage of trade the meaning of the word furniture did not include fishing-stores in the construction applied to a contract of insurance. I am not sufficiently aware whether this would govern the construction of the same word occurring in an act of parliament or in the phraseology of a court, in which its meaning is perhaps more to be collected from its proper and genuine import, than from a prevailing understanding, controlling its proper meaning in a contract between two individuals, whose words were not to be carried beyond their own intentions in the contract.

But it is unnecessary for me to pursue that question further; because it is an admitted fact, that this mode of initiating a suit by

<sup>1</sup> *Park on Insurance*, p. 97, 7th Ed.

<sup>2</sup> The edition of 1823, p. 735, published by the author's son, notices fully the case of *The Dundee*, as does Mr. Holt in the last edition of his work on Shipping and Navigation, p. 405.

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arrest of ship, tackle, apparel, and furniture, is the ancient formula of the court, though leading to a full remedy affecting all the property of every kind belonging to the owners. The same formula has existed and operated its remedy, under all the variations by which the remedy has been modified. It has been no further restricted, than as the statutes restricted it. But the initiatory terms, tackle, apparel, and furniture, founded the suit sufficiently to enable it to embrace all the objects which the statutes left subject to its operation. These restrained them only by their own particular restrictions. The same words went as far as the general law went, notwithstanding the narrowness of those terms ; and they must now go as far as the general law, limited only by that statute, extends.

[ \* 125 ] \* The cause proceeded upon this commencement, and a release of the ship from arrest took place, upon bail given in to answer for the liability of the stores as well as of the ship. I suppose it was an understood matter between the parties ; because there was no application to the court, upon any complaint of the oppressiveness of the bail required, and praying the ship might be released without giving bail for the stores. I think the transaction bears the face of an intention on both sides, that the question concerning the extent of the bail should be finally brought before the court controversially, but that the security now given was to include the fishing-stores, subject to the final opinion of the court upon their liability. I see no sufficient ground for a charge of ill faith on either side. The whaling ship is anxious to be discharged in prosecution of her voyage ; the owner of The Dundee is willing to accommodate, but expects security to be given for the fishing-stores in case they are required to contribute. That security is given as, and understood by the party as, conditional, though not so expressed in terms. But it is to be inferred, I think, from their agreement to have distinct appraisements of the ship and tackle, apparel and appurtenances. I do not, therefore, quite understand the ground of that complaint which has been indulged, that the word appurtenances was craftily introduced into the agreement about bail, by surprise upon The Dundee. In the first place the bail is taken for no more than for what they had mutually agreed, 9,000*l.*, the value of ship and appurtenances. If the

[ \* 126 ] appurtenances are liable, the stores are to be \* so deemed. In the next place, it is quite impossible that the word appurtenances should have been stolen in upon them by surprise. It is a very short instrument, though important as the great covenant between the parties. It could not have escaped notice. The instrument very naturally states the style of the court in the heading ; but the covenanting part introduces the word appurtenances, to which,

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as far as appears, no objection was made, nor any protest given or explanation demanded. It is only *arguendo* that I hear the slightest suggestion. But I must add, that with the sentiments I entertain, and have expressed, upon the statute, the word appurtenances is no intruder; it is the statutable word, which in the latter clause of that statute reflects back upon the enacting clause, and is fully entitled to share in the force of its obligation. The only remaining question can be whether the word appurtenances is properly applicable to fishing-stores on board a fishing-vessel. It is a word of wider extent than furniture, and may be properly applied to many things that could not be so described (with propriety at least) in a contract of insurance.

It may not be a simple matter to define what is, and what is not, an appurtenance of a ship. There are some things that are universally so—things which must be appurtenant to every ship, *quæ* ship, be its occupation what it may. But, I think, it is rather gratuitously assumed that particular things may not become so from their immediate and indispensable connection with a ship, in the particular occupation to which she is destined, and in which she is engaged. A ship may have a \* particular employment [ \* 127 ] assigned to her, which may give a specialty to the apparatus that is necessary for that employment. A ship built for the reception of galley slaves must have such a peculiar apparatus. Whether a whaler is originally built with any peculiarity of construction for that service, is more than I know; but this is clear, that unless she has various appurtenances not wanted in other ships, as well as a crew peculiarly trained, she had better stay at home, than resort to the Arctic regions, where alone her function can be exercised. A ship of war, public or private, has a special character: and it is a necessary consequence that she shall have special appurtenances. A packet, and particularly a steam-packet, has its specialties. A Greenland ship is not a merchant-ship carrying out a cargo to be exchanged; she has a special character superadded by her special occupation; and must have the machinery adapted to the catching of whales, and to the dressing them, in part, on board the vessel. All this machinery must be carried out; for harpoons and and rockets and lines are not to be found in the regions inhabited by whales. The word “appurtenances” must not be construed with a mere reference to the abstract naked idea of a ship; for that which would be an encumbrance to a ship one way employed, would be an indispensable equipment in another, and it would be a preposterous abuse to consider them alike in such different positions. You must look to the relation they bear to the actual service of the vessel. A

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merchant vessel carries cargoes, and generally of the same kind if she trades to the same country; for she must carry goods [ \* 128 ] that are \* marketable in that country; but the similarity of cargoes gives no special character to the ship. She continues, as before, merely a carrier, suited equally to the conveyance of other goods if they could be carried with advantage. The particular employment is transitory, and leaves her a simple merchant-vessel, as it found her, without any peculiar character belonging to her to be derived from the cargo.

To these considerations, I must add, that if the stores are not liable in contribution, this class of vessels is favored in a very unfair degree. If a ship is run down at sea by a merchant-vessel, the wrong-doing vessel is, by the act that diminishes the general responsibility, still liable to contribute not only to the extent of herself, but to that of her freight outward, and of her freight homeward if contracted for, and for what owner's property would have paid for freight, if it had been liable for freight. But in this class of vessels there is no freight either outward or homeward, nor any owners property on board; and unless the fishing-stores are made responsible in contribution, here is no fund for compensation but the vessel itself, as is actually contended for in the present instance. This class of vessels is highly favored by the British legislature, and most deservedly, not only as the acquirers and importers of a most useful and valuable property, but likewise as nurseries of a race of invaluable seamen, of skilful and adventurous mariners, peculiarly qualified to encounter the hardships which the elements in those climates can present. But surely it can be no part of the intended encouragement, [ \* 129 ] that they shall be qualified to do \* mischief at a cheaper rate than other vessels. If nothing but the vessel itself be liable, that would present a result apparently very unequal and unjust, not only to the injured vessel whose compensation was so much abridged, but likewise to all other vessels, which, having committed the like injuries, were subjected to a so much severer retribution.

On all these grounds I pronounce that the fishing stores are liable to contribution.<sup>1</sup>

Costs refused.

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<sup>1</sup> The owner of *The Dundee* subsequently applied to the Court of K. B. for a writ of prohibition. "The court, however, declined to interfere in a summary way, and directed the plaintiff to declare in prohibition. Accordingly an action was brought in M. T. 1823; and the cause came on before Abott, C. J., when it was agreed to turn the facts of the case into a special verdict." Holt, 2d ed. p. 411. The case has since been argued before the Court of K. B. by Mr. Campbell for the plaintiff, and Mr. Tindal for the defendant; and now stands for judgment. [Judgment was finally rendered in favor of the defendant. *Gale v. Laurie*, 5 Barn. & Cr. 156.]

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Captures on the Jamaica Station. 1 Hagg.

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## CAPTURES ON THE JAMAICA STATION.

April 15, 1823.

**Flag-share.** Claim of Sir A. C. upon two grounds; first, that he assumed the command of the fleet under orders from the Admiralty; secondly, that without any direct orders from the Admiralty, he had a right, acting upon his own authority, as admiral, though subject to responsibility for so doing, to take upon himself the command of the fleet; not sustained.

THE proceedings, in this case, originated in a monition decreed against John Carter, Esq., late commander of H. M. S. *Thracian*, to show cause why Admiral Sir Alexander Cochrane, Bart., \* should not be pronounced entitled to the flag-proportion [ \* 130 ] accruing from certain prizes captured in the Gulf of Mexico, on the Jamaica station. The cause was argued by *Lushington* and *J. Addams*, for Sir A. Cochrane; and by the *King's Advocate* and *Phillimore*, for Captain Carter.

## JUDGMENT.

LORD STOWELL. This is a question of interest between Sir Alex. Cochrane and Captain Carter in prizes taken so long ago as the year 1814, by the fleet on the Jamaica station, each of these gentlemen claiming to share as commander of that station, at the time of the captures.<sup>1</sup> The facts are, that Admiral Brown, who had the command of that station, died the 20th of September, 1814, and there was no admiral present on the station to assume the command, which was assumed by different officers of rank inferior to that of admiral, till the arrival of Admiral Douglas with admiralty orders, in the May following, the admiralty order bearing date on the 18th of January. Captain Carter claims his share as the officer commanding upon the decease of Admiral Brown, having no superior in the fleet above him; but a claim is interposed for Sir Alexander Cochrane, upon two grounds; one, that he assumed the command of the fleet under orders and instructions from the \*ad- [ \* 131 ] miralty; that ground alone is put forward by himself; the

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<sup>1</sup> Captain Carter, in his answer to the sixteenth article of Sir Alexander Cochrane's allegation, admitted the following captures, namely,

Captured by Captain Carter.	{ Supply and Paulina . . . . .	29th Sept.	} 1814.
	{ Maria . . . . .	5th Oct.	
	{ Amelia . . . . .	14th Nov.	
	{ Eleanor . . . . .	1st Dec.	
	{ Netterville, captured by Captain Cobb . . . . .	25th Dec.	

other is put forward by his counsel only; it is not to be found in his plea nor in his evidence, but only in the argument of his counsel — that without any direct orders from the admiralty, he had a right, acting upon his own authority as admiral, though subject to responsibility for so doing, to take upon himself the command of the fleet.

There are many reasons, I think, that must discourage this court from paying much attention to this last position. It is quite a sufficient one that Sir A. Cochrane does not venture to claim upon that ground, and that there is no portion of the evidence that applies to it, but one which denies it, that of Admiral Douglas. So that if this court did venture to admit it, it must be in the teeth of the only evidence that applies to it. But I must add that, without strong evidence in its favor, I should be deterred from pronouncing for it. In as far I can judge, it would be a rule likely to produce great public inconvenience and danger. The distribution of the public maritime force lies with the government. To them alone are the exigencies of the various public services known — what is wanted here and what is wanted there, and how these wants can be best and most commodiously supplied. An admiral at a distance has only a partial and limited view of those exigencies, of what presses only on a particular quarter under his eye, whilst an approaching greater necessity may call for the application of that force elsewhere. The utmost that a bold imagination could venture to conjecture, would be, that the contrary must be the rule, and the other possibly an exception —

[ \* 132 ] a \* splendid exception, to be justified by a sound discretion, acting with effect upon a great and urgent necessity. But I do not even presume to lay down that rule or any other. These papers refer to rules and regulations of the navy, which are not all before me; and I should be worse than the pedant instructing Hannibal in the art of war,<sup>1</sup> if I were, from any judgment of my own, to state what I considered as the rules that ought to direct the conduct of the Admiralty upon such a subject.

I confine this case, therefore, as Sir Alexander Cochrane has confined it: — Did the admiralty authorize him to take the command of this station in such a manner as to entitle him to the flag-share? Did he assume the command? And if the admiralty did not originally authorize it, have they given such a subsequent approbation as may be supposed to confirm and acknowledge that authority?

The authorities to which Sir Alexander appeals are the instructions he received, partly from his predecessor, and partly direct from

<sup>1</sup> Cicero de Oratore, lib. ii. s. 18.

the admiralty. The latter he received on the 19th September, and he acted immediately upon his interpretation of them; for he sent the next day a communication to the fleet upon the Jamaica station, he himself being on the Halifax station, to put themselves under his command; so that upon the fact no question remains, and he exercised it, as far as appears in these papers, till the arrival of Admiral Douglas, as has been pressed — exercised it in almost every form, gave orders of almost every species, filled vacancies, inflicted punishments in consequence \* of court-martial sentences; in [ \* 133 ] short, performed all the functions of an able and active commander of the fleet, not only when present with it, which he was from November the 16th to the 26th, during which time none of these captures were made, but likewise before he quitted his own station at Halifax, and after he had passed through the limits of the Jamaica station, which he did upon the 29th, conceiving himself authorized so to do till the appointment of a successor by the admiralty. Upon the assumption, therefore, and exercise of command, no doubt hangs; but the question remains, whether that assumption was made correctly, and in conformity to the authority communicated to him by the admiralty.

Now, I confess I am unable, upon any interpretation I can apply to these orders, any or all of them, from the admiralty, to find an appointment to this command. All that appears is this. An expedition to New Orleans had been projected by the government here; in consequence, instructions were forwarded to Sir Alexander Cochrane, the commander on the Halifax station, authorizing him, in certain events, to enter upon either of the West India stations, for it seems there are two, or to send one or more of his flag-officers there, for the execution of any particular service connected with that expedition. An instruction had been given to Sir John Borlase Warren, his predecessor, and which was delivered over to him as part of his instructions, manifestly contingent on an event that never happened, and to be temporary whilst the pressure of that event lasted. No. 1 is a letter from Lord Melville, dated 29th July, 1814, not a word of taking the command of \* the fleet on the Jamaica sta- [ \* 134 ] tion; nothing but an optional commission to proceed either himself personally to that station, or to send some of his ships there. For what? To assist in the projected expedition to New Orleans, not for any service to be performed on that station through which he must necessarily pass if he put himself in motion for that expedition. No. 2 is from the Secretary of the Admiralty, dated the 1st of August, 1814, an instruction to enter into either of the West India stations upon certain events, or to send flag-ships there. What those



events were was not stated there, but are to be found in the antecedent instructions given to his predecessor, Sir J. Warren, dated November, 1813, in which he is directed, in case any superior hostile force entered either of the other stations, to proceed there himself, or send reinforcements to the British admiral; and if he went himself, to take that admiral and the fleet under his temporary command. This was a contingent instruction, dependent on an event which never took place, either in his time or his successor's. The last letter pleaded as instructions conveying authority, is one dated the 10th August, 1814, from the secretary, relating entirely to the expedition against New Orleans, and the arrangements proposed for it, with a permission either to proceed there himself or to send one of his flag-officers to coöperate with General Ross on that service.

Now, I confess I can see nothing like a clear and definite delegation of authority, as contended for on the part of Admiral Sir Alexander Cochrane. I cannot but think that, if the admiralty had intended to give it, they would have expressed that intention [ \* 135 ] \* in a more direct and precise manner, and not have left it to remote inference, in the way now proposed. That consideration alone would determine my conduct, even if the expressions themselves had not been such as to warrant a different interpretation from that which has been imposed upon them.

The case, then, wanting original authority, falls back upon subsequent recognitions, which, it is said, supply its place; and this is pressed principally upon the ground that no censure has been passed upon the assumption and exercise of the command; and that, on the contrary, the admiralty prosecuted Captain West, at the instance of Sir Alexander Cochrane, for disobedience of orders.

Now, taking it to be the fact that no censure was passed, that may be accounted for upon many reasonable suppositions: — that the admiralty might not think it necessary to proceed to that length upon a mistake committed by an officer of high reputation, it being a mistake which had led to no unlucky results; the ordinary business had gone on in the usual manner; sentences of courts-martial upon seamen were carried into execution in a proper way, and other proceedings were regularly conducted. At any rate, positive censure is not requisite to prove that such an authority was erroneously assumed. But if something of a censure, though of the mildest kind, be requisite, it is not wanting. The refusal to allow the usual privilege of appointing to vacancies, and the annulling of all the appointments Sir Alexander had made, is of itself sufficiently significant of the fact that the admiralty and Sir Alexander Cochrane thought [ \* 136 ] very differently upon this matter. What further \* may have

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Captures on the Jamaica Station. 1 Hagg.

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passed between them and him does not appear; but this appears, that they refused him the usual honorary privileges assigned by admiralty orders to the commander of a fleet upon a distant station. And Admiral Douglas sufficiently explains the reason, when he says that, at the time of his appointment, Lord Melville and Sir George Hope assured him that Sir A. Cochrane had not the command of that station, and that he himself, by order of the admiralty, filled up all the appointments made since the death of Admiral Brown, as having been made without authority.

The case of Captain West is told in a very imperfect manner. It appears by a letter of Sir A. Cochrane's, dated off Chandeleure, January 21st, 1815, that Captain West came out with transports from Cork for the expedition. He arrived at Jamaica, where he remained, sending in the transports, and justifying himself under the admiralty orders. Sir A. Cochrane thought him not justified, and ordered him to come on to him at Chandeleure, but he remained in port, and accepted a transport of money on freight to England. Sir Alexander writes to the admiralty, to desire that he may be tried by a court-martial, for not proceeding to join him at Chandeleure, with his convoy of transports, and for quitting his station when under his command, and returning to England. He was tried, and was acquitted. It does not at all appear whether he was tried on both charges, or only on one. If only on the first, it proves nothing at all, because the admiralty would most assuredly have tried him upon that if informed of the fact upon any credible testimony, unless he was justified by the admiralty orders. If he was tried upon the other charge, then it proves against the authority claimed for Sir A. Cochrane, because there could be no doubt that such [ \* 137 ] an order was given; and if not enforced by the court, it must have been upon the ground of its invalidity, unless it was shown that it had never been received.

This comprises the whole of Sir Alexander's case. For surely the cases referred to in argument lie at a great distance from it. In the case of *The Diomedé* (a very complicated case,) the party was held to the original authority under which he acted, and not to that which he accidentally joined.<sup>1</sup> So in *The San Antonio*.<sup>2</sup> The cases of

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<sup>1</sup> It was stated by the King's Advocate in his argument, that the case of *The Diomedé* depended upon such a combination of circumstances, and those of such a strange complexion, that it could hardly be made a standard of general dicta for other cases,

<sup>2</sup> 5 Rob. 215.

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The Wilhelm Frederick. 1 Hagg.

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Rodney and Nelson were, if not conformable to admiralty orders, splendid exceptions, justified by the magnitude of the services performed, and by the subsequent applause of the admiralty and the nation; such exceptions as create a rule for themselves alone, but cannot be carried further where the same happy circumstances do not exist.

It adds much to the disinclination of the court to support such a claim, that Sir Alexander Cochrane had not arrived within the limits of the station at the time when any one of these captures [\* 138] \* was effected. If an admiral is appointed by the admiralty, and actually has given an order to a fleet, he is entitled, though not within the limits at the time of capture. But I know of no such indulgence having been shown to an admiral who has issued a command without such an authority; and unless such a practice were shown, I should not hold myself at liberty to apply it. Upon the whole, therefore, I must pronounce against the claim of Sir Alexander Cochrane to a flag-share in any of these captures.

Costs refused.

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WILHELM FREDERICK, Noorman.

May 13, 1823.

Mariners' wages claimed by subjects of the king of the Netherlands. Objections to the jurisdiction overruled.<sup>1</sup>

THIS was a cause of subtraction of wages, in which the ship, her tackle, apparel, furniture, and the freight due for the transportation of the cargo lately laden therein, were arrested on the part of the late mate, and one of the seamen on board The Wilhelm Frederick. An appearance was given under protest for the owners, merchants of Amsterdam; and alleging that they were subjects of the King of the Netherlands, and that the said ship sailed under Dutch colors, and

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and that this was probably the reason why the original judgment had not been reported. The sentence of the High Court of Admiralty was affirmed on appeal. 1 Acton, 239. And the arguments of counsel, before the Court of Appeal, are reported in the same volume, p. 69. The case of *The Empress*, 1 Dod. 371, was also cited by Dr. Lushington, as recognizing the principles established in *The Diomedé*.

<sup>1</sup> [*The Golubchick*, 1 W. Rob. 143; *The See Reuter*, 1 Dod. 22; *The Vrow Mina*, 1 Dod. 234.]

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The Wilhelm Frederick. 1 Hagg.

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regularly documented as a Dutch ship ; that, in the prosecution of her voyage from Amsterdam to a port in France, she put into the Isle of Wight in great distress, where she was arrested under warrant from this court, without the sanction or consent of the Dutch

\*ambassador in this country ; and further alleged, that pre- [ \* 139 ]  
viously to the sailing of the said ship, the whole of the crew

duly executed certain articles of agreement, by which the mode of enforcing the payment of their wages is particularly set forth :—

“ That none shall have a right to take proceedings at law against the master in foreign ports, but all disputes and complaints against the master shall be settled or prosecuted on arrival in this country. In

case the ship, whilst abroad, should be sold, condemned, or the continuation of the voyage be suspended, so as to render it necessary to discharge the crew, the master shall be bound to make a settlement with

every one, at such place, and to deliver to each of them an order upon the ship's husband, or correspondent, for the wages due to each, with

a proper allowance for travelling expenses, or passage-money, proportioned to the distance to this place ; and no one of the crew shall demand of the master any further payment, much less his whole

wages, on pain of punishment according to law ; and in case the master should be remiss in performing what is above mentioned, the injury thereby occasioned shall be made good to the crew by the

master at this place.” That on the arrival of the ship at Cowes, she was surveyed, and, in consequence of the damage she had received,

was found to be utterly unable to proceed on her voyage ; that the cargo was there unladen, and the further prosecution of the voyage was abandoned, when the men were discharged, upon a tender of

their wages and a free passage home, which they refused to accept. The other side alleged, that the action was prosecuted with

the previous sanction and consent of \* the Dutch consul- [ \* 140 ]  
general for Great Britain and Ireland ; that upon the ship

being obliged to put into Cowes, James Day, the Dutch Vice-Consul at that place, undertook to act as agent for the master and the ship ; that the ship was repaired and refitted for sea, and subsequently the

cargo was sold and disposed of at Cowes ; that the said owners abandoned the ship, and advised the master and their agent to that effect ; that, accordingly, the master executed an assignment of the ship,

her tackle, &c., to the agent and others, in trust for, among other purposes, the payment of the seamen's wages ; that the men continued in the service of the ship, and were victualled by the said master, through the agent, until the provisions were withheld ; and they submitted that, although the articles of agreement might operate to pre-

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The Wilhelm Frederick. 1 Hagg.

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clude a suit or action against the master, they would not affect the action now prosecuted against the ship, her tackle, &c., &c.

In support of the protest, *Lushington*. The ambassador of the Netherlands has not given his consent to the institution of this suit. In *The Mexicana*, *Arkenson*,<sup>1</sup> which was the case of a ship arrested in a cause of wages, the court said, "that the consent of the Spanish consul was not sufficient to authorize the Court of Admiralty to entertain a suit between Spanish subjects;" and it moreover added, "that the sanction of the Spanish minister was necessary." He also cited the previous case of *The Courtney*, English, Edw. 240. 2dly, The particular articles of agreement bar the seamen from [\* 141] resorting to a foreign jurisdiction. \* But, besides these objections, here is an affidavit that these men were paid their wages on the 30th April, and their receipt is in the following terms: "We have finally settled for, and received the wages due to us respectively, and have no further nor other claims upon the ship."

*Phillimore* and *J. Addams, contra*. It appears, from a search into precedents, that the authority of the consul-general has always been held sufficient for suits of this kind. That is considered to be the consent of the accredited agent of the government to which the suitors belong, as was observed in the case of *The Courtney* which has been cited. *The Mexicana* was a case essentially different in its circumstances from the present. There, the vessel was about to proceed on her voyage; here, the vessel was abandoned by her owners; for they write thus to the master: "We cannot interfere, as the survey of repairs exceeds the value of the ship; you ought to have abandoned her, and had her sold to break up, in which case the crew would have been paid out of the proceeds." This is a complete recognition of the right of the seamen to sue; and the ship having been assigned over to English creditors, the men are without a remedy, if not assisted by this court. We admit that they have received their wages; and they now apply for their costs.

#### JUDGMENT.

LORD STOWELL. I believe the ambassador's consent has been given in this case, though it may not appear upon the proceedings. But I am of opinion, that this was not the arrest of a foreign ship, but of a British. The owners had abandoned her to the discretion of

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<sup>1</sup> Decided July 15th, 1814.

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The Helen. 1 Hagg.

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\* the captain, who assigns her over to British creditors at [ \* 142 ] Cowes. Here was then a disclaimer by the owners, of their own articles of agreement; their contract with the seamen was at an end; and I am satisfied that the seamen may, under these circumstances, proceed, on the general law, to establish their claims. It is not, therefore, necessary for the court to enter further into the case. I overrule the protest, and decree to these men their costs to the time when they gave a full and final receipt.

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HELEN, Cornish.

May 13, 1823.

Property found on board a pirate ship, and condemned as droits of admiralty, granted to the original owners upon a memorial to the crown.

THIS vessel, with an assorted cargo, sailed in July, 1819, on a voyage from Liverpool to Genoa and Leghorn. On 3d August, while off Cape de Gatt, she was piratically boarded and plundered of a quantity of bales, cases, and various other goods, by the master and crew of the brig William; who afterwards disposed of the goods in the islands of Sardinia and Malta. The brig was subsequently boarded and taken possession of at Smyrna, by H. M. ship Spey, and Delano the captain, and the crew of the brig, were severally convicted at a sessions of oyer and terminer held at Malta; and, on the 4th February, 1820, were executed.

\* The proceeds of the goods that arose from the several sales, [ \* 143 ] had been paid to the pirates principally in gold coin, which, with other effects found on board, were deposited in the hands of the government treasurer at Malta. On 30th June, 1821, a monition issued<sup>1</sup> calling on all parties to show cause why this property should not

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<sup>1</sup> HERCULES, otherwise DUKE OF PARMA, Brown.

April 6, 1819.

Arrest of proceeds of goods piratically seized.

In this case the court decreed two warrants to arrest the proceeds of the cargo of a Spanish ship, unlawfully and piratically taken possession of on the high seas.

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The Helen. 1 Hagg.

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be condemned as droits and perquisites of the admiralty. An appearance was given for certain British and foreign merchants, as the lawful and sole owners of the cargo late on board *The Helen*, praying the payment of the proceeds to their use. On 23d October, in the same year, the court rejected the prayer of the claimants, together with their petition for costs to be paid out of the proceeds in the registry; and condemned the goods as droits of the admiralty. From this sentence the claimants appealed.

In support of the sentence, the *King's Advocate* shortly opened the case by stating, that even if the fact were established, that the money found on board the pirate vessel proceeded from the goods of the asserted owners, a question would arise, whether, in strictness of law, they could claim it. The owners may pursue their own property, but they cannot make out a claim to money arising from it.

The goods themselves, and not the proceeds of those goods, [ \*144 ] are liable to be attached. \* Goods of pirates go to the crown, as droits of admiralty.

*Arnold* on the same side.

*Adams, contra.* I admit that the crown is, generally speaking, entitled to all *bonâ piratarum*. It is, however, a right so far qualified, that if any persons can establish a title to the goods, the possession of the crown ceases. It cannot hold them as against the lawful owners. If, in the present case, the owners should succeed in convincing the court that the specie found in the possession of the pirates was the proceeds of goods taken piratically from *The Helen*, they would then be met with that question of law thrown out by the *King's Advocate*; and they could not contend against it successfully. It is quite manifest that these proceeds did result from the goods of these claimants. The indictment at Malta was against the eight prisoners, for their offence against this ship, and this ship only. Although the parties have no strict right, it must be admitted that they have an equitable title; and we therefore hope that the crown will graciously hold this property, as a great trustee, for the use and benefit of the owners. It is almost impossible that there can be any other co-claimants.

*Lushington* on the same side.

LORD STOWELL observed—The course that is proposed, and not dissented from by his Majesty's advocate, is most equitable. An applica-

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tion should be made to the crown, in order that the distribution of the property may go in the way suggested ; but leaving it entirely to the benignity of the crown. It is, however, necessary to affirm the sentence ; otherwise the crown can do nothing positive- [ \* 145 ] ly with respect to such an equitable disposition.<sup>1</sup> Sentence affirmed.<sup>2</sup>

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THE KING v. WHITTAKER.

May 28, 1823.

Appeal from the Vice-Admiralty Court of Jamaica sustained. Condemnation and forfeiture under the navigation and revenue laws. Penalty under 4 Geo. III. c. 15, s. 37, held to attach.

THIS was an appeal from the Vice-Admiralty Court of Jamaica, in which a prosecution had been instituted by H. M'Dowall, late acting collector of customs at Kingston, in that island, against William Whittaker, a pilot, for penalties incurred, by being concerned in landing 211 barrels of flour at Milk River Wharf in Jamaica, or by knowingly receiving them after they have been landed by some persons unknown, and before the duties had been paid.

The information, which was filed on the 28th December, 1820, by Mr. M'Dowall, for himself, for the governor, and for the king, pleaded in five counts, that on the 6th October preceding, Whittaker was unlawfully concerned in the landing of these goods, which were of the value of 277*l.* 4*s.* 2*d.* currency, by which offence, under the statute of the 4th Geo. III. c. 15, he became liable to a \*forfeiture of the treble value, viz., 831*l.* 12*s.* 6*d.* currency, [ \* 146 ] the goods being charged in the three first counts to be prohibited goods ; whilst the fourth and fifth counts charged the landing to be before the duties were paid. In the court below, the penalties were held not to attach.

On behalf of Mr. Whittaker, *Arnold* and *Jenner* made two points : 1st, that the burden of proof, in this case, did not fall upon the de-

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<sup>1</sup> A memorial was accordingly presented to the lords of the treasury, who directed the proceeds to be paid over to the petitioners ; the law expenses being first deducted.

<sup>2</sup> By 6 Geo. IV. c. 49, the capture or destruction of piratical ships is further encouraged.



fendant; and 2d, that the libel and sentence of condemnation of the goods, being under other statutes than that which inflicted the penalty, could not be received as sufficient evidence against him. It is a general rule of law, that the burden of proof rests with the accuser, subject to some legislative exceptions. Such exceptions are undoubtedly introduced into several of our revenue statutes, as in 13 & 14 Ch. II. c. 11, s. 28, and in 7 & 8 W. III. c. 22, s. 7; but these are laws of an odious and harsh nature, and these are special enactments, that it has been thought necessary to introduce into them for their support; but they are contrary to the general principles of justice and equity; and are, therefore, *stricti juris*, and cannot be carried one step farther than the express words of the law. Here the information was grounded on the 37th section of the 4 Geo. III. c. 15, which is an enactment of a high and penal nature, imposing a forfeiture of treble value, and may therefore be said to be *strictissimi juris*. The statute itself draws a marked line of distinction, with regard to the *onus* of proof. By the 45th section it is enacted, that where a ship or goods are seized for any cause of forfeiture, and a dispute shall arise whether the duties have been paid or [ \* 147 ] the goods \*lawfully imported or exported, or concerning their growth, produce, or manufacture, or the place whence they were brought, there the burthen of proof shall be on the claimant. This, therefore, is an exception to the general rule of law, this act of parliament having in its clauses, applicable to forfeiture, the same enactments that were to be found in the earlier statutes upon the revenue. But by section 36, where a penalty of treble value is imposed on the master of a ship, "in case it can be made to appear, that he was in anywise consenting or privy to certain frauds or concealments;" there the burden of proof rests, according to the general law, with the prosecutor. The same mode of proof is there required, as in all other criminal cases, that where an offence is charged, it should be proved by those who assert it. The 37th section, on which the information rests, imposes the penalty on any person concerned in landing prohibited goods, or goods on which the duties have not been paid: this, then, being a case of penalty, the prosecutor must prove it. Now, what is the meaning of prohibited? It will be contended, that all goods are prohibited which may not be freely landed; but we contend that prohibited goods are such goods as are forbidden to be landed under any circumstances whatever. The article in question here is flour; with regard to which commodity the enactments have varied; but by 58 Geo. III. c. 27, flour is, among other things, admitted into the British colonies from any other colonies. It is true, that a sentence of condemnation has passed upon this

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flour; but we submit that this is not evidence that can be received in the present penal proceeding against Mr. Whittaker.

Proof of the infraction of one statute is not \*evidence to [ \*148 ] affect a person charged with penalties under another statute; and they cited the case of the Attorney-General v. King, 5 Price, 214, that a record of conviction under one statute was not evidence, even against the same person, on a proceeding under another statute; and the reason of that rule applies here in support of our position. Here is, therefore, no evidence that the flour in question was prohibited in any sense of the word. It certainly was not universally prohibited; and if importable, under any circumstances, here is no admissible evidence that it was not so imported. As to the counts charging the landing of the goods before the duties were paid, evidence is certainly adduced that there was no payment: but what is this evidence? A clerk proves the searching of the custom-house books, and that he does not find any entry of payment: but on the first and principal point, namely, that this flour was liable to pay duties, there is no evidence at all before the court.

The *King's Advocate* and *Adams, contra*. The rule of law attempted to be drawn from the case in Price's Reports does not at all apply here: that case related to two separate acts of parliament; but the condemnation of this flour cannot be said to have taken place under a distinct and separate statute from that which imposes the penalties that have been incurred; for though it may have proceeded under former revenue statutes, yet these have been adopted into the statute of 4 Geo. III. c. 15, which, in s. 37, refers to forfeitures "under this or any other act of parliament." As to the word "prohibited," it is a word of large extent. Scarcely any one article is universally prohibited; \*and, on the other [ \*149 ] hand, this article, flour, is clearly a prohibited article, unless imported as the law permits. For the general law of importation into the colonies is a law of prohibition, and to escape from that law the party must show a law of permission. The words "prohibited goods" stand in opposition to "permitted goods," and permitted goods are always *sub modo*. The ship, in the present instance, incurred suspicions by landing the goods at unusual places; she never entered herself at the custom-house, nor did she venture to approach it; but deposited her goods in a way best calculated for smuggling.

[COURT. Is there any proof of its being a foreign ship?]

No. The ship was gone before the cargo was seized, so that there was no power of ascertaining her character. The prosecutor does not contend that flour may not be sometimes importable; but he says,

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it could not be importable in this manner. As to its being liable to duties; if it was not so, it is singular that Mr. Whittaker himself does not assert that it was not. On the contrary, in his answers to the information, he admits "that the goods may have been landed before the duties due thereon were paid;" and in a letter to the master of the ship,—"If the flour does not bring fourteen dollars per barrel, it will not cover the duties and charges." As to the fact of landing them, knowing the illegality, there was evidence enough to prove that Whittaker must have known that she could not have been up to the custom-house, and could not have imported legally. Admitting, therefore, for the sake of argument, that the burden of proof is upon us, we contend that we have entirely sustained it. It was competent to the party to have given an entire exculpation [ \* 150 ] of himself; he might have given a plea, and have examined witnesses; instead of which, he has only admitted, in his answers, what he knew would be proved against him.

In reply, it was said, that the principal accusation against Whittaker was, that he was "knowingly" concerned in an illegal landing; but the evidence clearly negatived such guilty knowledge, and there was no ground whatever to believe that he did not think it an open and fair transaction.

#### JUDGMENT.

LORD STOWELL. This was a proceeding against the defendant in the Vice-Admiralty Court of Jamaica, for an offence against the revenue laws. In the papers before me I observe that something is said about an objection to the jurisdiction of that court, as incompetent to proceed for penalties under the statute; but no such objection forms any part of the proceedings which have come up hither regularly by appeal, nor was it urged in the argument; and I therefore do not think it necessary to take any further notice of it.<sup>1</sup>

In the present case, an information was filed in the court below against the defendant, William Whittaker, and the information was contained in five counts, applying to the same fact. 1st, [ \* 151 ] For \* being concerned in unshipping certain prohibited goods, namely, 211 barrels of flour into Jamaica; 2d, for unlawfully landing said goods; the 3d, 4th, and 5th counts, described the unlawful act in different ways, by which, if any one is proved,

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<sup>1</sup> The *King's Advocate* observed, that there was no objection to the jurisdiction of the Vice-Admiralty Court in the present case. With reference to the same objection, he mentioned the case of the *King v. O'Hara*, which was an appeal from the same court, on similar proceedings, and in which the sentence of the court below was affirmed, 25th July, 1819; the doubt, he said, arose on a case from Antigua.

the goods are forfeited, and also by 4 Geo. III. c. 15, subjects the party delinquent to a penalty of treble their value. The value of the goods in this case was 277*l.* 4*s.*; the treble value, therefore, would be 831*l.* 12*s.* The goods may be either simply prohibited goods, or goods prohibited *sub modo*, by being imported before payment of the duties. The penalty is the same regarding either, and attaches upon proof either that the party unshipped or landed them inwards, or received them knowingly into his hands. In this case there had been a proceeding against the goods, and a forfeiture decreed; and it is followed by the present procedure, which is for the treble penalty against this individual. The former proceeding proved only that an unlawful act had been done; it then left the matter short; for confiscation is not necessarily followed by penalty, because, to inflict the penalty, the offence must be traced to the individual; and it had not been proved to have been done by Whittaker. In order, then, to affect Whittaker, it must be shown by proof, that he is the person who did the interdicted act which draws down the penalty. It is possible that it may be sufficiently proved by the condemnation of the goods, if they are traced to his possession, and so declared in the record of the procedure; but if the record of the procedure avers nothing against him personally, it must be otherwise proved; for the proof that an unlawful act has been done, does not prove that he did it.

\* There have been some considerations urged that may be [ \* 152 ] safely dismissed; one was, whether the goods were custom-able or prohibited. There is no occasion to inquire into this point. The act of parliament embraces both, making the distinction, but applying the same penalty; and therefore, it is immaterial to inquire whether the distinction is not merely verbal, that is to say, prohibited absolutely, or prohibited *sub modo*. Next it is contended, that the evidence taken upon the forfeiture is not conclusive upon the penalty, and certainly it is not in all cases; for it may prove a criminal act in a smuggling transaction of this nature without indicating the guilty person. It is a proceeding against the goods and not against the persons, who may be unknown. In the present case the guilty person is not indicated; all that is proved is, that a criminal act affecting the goods has been done; that does not touch Mr. Whittaker; there must be undoubtedly other proof to connect him with the present transaction, and if that is not given, *eat sine die*. As to the words cited from the Lord Chief Baron, (Richards,) as reported in the case of the Attorney-General v. King,<sup>1</sup> they have no application whatever

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<sup>1</sup> 5 Price, 214.

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The King v. Whittaker. 1 Hagg.

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to the present question. That went no further than this, that you could not support a penal prosecution by a statute made after the time when the penal act was charged to be committed. The penal act was receiving goods into the party's possession; and the statute making the receiving of them criminal, was not enacted till months after the possession was taken, when it was no criminal act at all.

In the present case, it is perfectly clear that this statute [ \* 153 ] \* connected itself with every other prohibitory statute. It furnishes a general rule; and is applicable to every pre-existing statute upon the subject.

The question does not arise, whether if an existing statute imposed a penalty upon an act, which before subjected only to forfeiture, the recorded conviction of the act of forfeiture might not be invoked for the purpose of enforcing the penalty, if it pointed to the offender *nominatim*, though it might not in terms connect it with the statute of forfeiture, but only described the same fact identically. Here is a proceeding upon a statute declared in terms by the statute, to be in aid of all the other statutes preceding it *in pari materia*;—"of this or any other act of parliament," being the terms of this sweeping clause. It is true that there is nothing that affects Whittaker by name in the record of forfeiture as an offender, and evidence must be imported *aliunde* to affect him. If it had named him, according to the authority stated in the report cited, it would have concluded him, notwithstanding the objections taken to the evidence. But as it stands, it is only conclusive upon the fact. You cannot throw the record on the table, and say you have proved your case. The record proves only that the law has been actually violated; it has not been appealed to, and therefore cannot be examined; it must be taken to be just; but to affect Mr. Whittaker you must go further,—you must show by direct proof that he was concerned in the act of violation, in some one of the ways described in the libel.

The whole question in this case therefore is, has this been [ \* 154 ] shown? It has been pretty much argued, \* as if there were no such evidence. But is that so? Is there not direct proof? He certainly denies it in his answer; but he offers no evidence in exculpation. The whole evidence is the other way, and evidence coming from himself too. Here is his own letter to Mr. M'Lean,—“211 barrels of flour which I have taken in payment of an account, and which you will make a sale of.” This is clearly the order of a proprietor to his agent. Then M'Lean is examined, and he confirms this representation; he was the wharfinger, he received the letter, he took the flour, he sold part of it, and the rest was seized. Here is direct proof unopposed and unexplained; no account is given

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The King v. Spies and Whittaker. 1 Hagg.

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how Mr. Whittaker reconciles this testimony, and this letter, in a way that shall absolve the charge of having these goods, however unlawfully landed or imported, coming knowingly to his hands. Here are directions and orders given to a person who acted as his agent in the management of these goods — the possession of that agent is his possession. The goods are put into the agent's hands only in consequence of coming to his. I must connect this evidence with the illegality proved by the record of the forfeiture, and it fills the chasm which I observe was left in the judgment so far as Mr. Whittaker is concerned.

There may be more hardship to the person affected by this penalty, than I am informed of by these bulky papers, but it is evident at the same time, that if transactions of this kind are not watched, pretences will be easily formed for avoiding very important regulations of law. What has been done by the parties here, may be done everywhere besides in the plantations. Instead of \*making their [ \* 155 ] way to licensed ports with established custom-houses, where due distinction will be made, vessels may be instructed to visit coasts where there are neither ports nor custom-houses, and deposit there, in unknown quantities, goods absolutely prohibited, or customable goods without any payment of customs. Finding sufficient proof of the fact, I must pronounce that Mr. Whittaker is subject to the penalty incurred by the confiscation of these goods.<sup>1</sup>

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THE KING v. SPIES & WHITTAKER.

May 28, 1823.

Appeal from Jamaica. Partial affirmance of sentence.

THE *King's Advocate* stated that this was an offence of the same kind as the last, but of anterior date. It was *in panam* against Spies, as he had given no appearance. The evidence was not absolutely direct and positive against Whittaker, but it was quite conclusive against Spies, for it stands upon his own acknowledgment as to his privity of the landing of the goods.

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<sup>1</sup> For the recent acts of parliament relative to the present system of colonial policy, *supra*, pp. 32, n. & 108, n.

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The Eleanora Charlotta. 1 Hagg.

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The COURT reversed so much of the decree of the court below as acquitted Spies of the charges set forth in the information, and pronounced that he was liable to the penalties, and decreed a monition against him for their payment; but, with respect to Whittaker, the court was of opinion that there was no sufficient proof. It therefore affirmed that part of the sentence.

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[ \* 156 ]      \* ELEANORA CHARLOTTA, Osterman.

June 17, 1823.

Salvage. Tender upheld. Costs refused. The notion that the salvors impair their title to remuneration by quitting the ships, is ill founded.<sup>1</sup>

THIS was a Swedish vessel, which, having lost her rudder in the Bay of Biscay, was met with off the Isle of Portland, and taken into Brixom Harbor. A tender of 50*l*. was made by the Swedish consul, as a reward to the salvors, which they refused. The matter was then referred to arbitration, and the sum of 130*l*. was awarded, to which the consul would not agree. Upon a detail of the circumstances under which the services were rendered, by the counsel for the salvors,

LORD STOWELL said — It was unnecessary to hear the opposite counsel. He had a decided opinion that, in this case, the course pursued by the salvors was injudicious in the highest degree. The port to which the vessel had been taken was extremely inconvenient. She should have gone to Dartmouth, and not to Brixom; and if the vessel had not, under the directions of these men, laid to during the night, she might have been at Dartmouth the next morning. It is an ill founded and absurd notion, that, unless salvors stick by the ship, they forfeit, or at least impair, their title to remuneration. It is very desirable that salvors generally should know that, in order to maintain their rights, it is perfectly unnecessary to remain on board the vessel which may have received their assistance. In this case, there has been an expense of litigation totally disproportion-  
[ \* 157 ] ate to the sum in dispute; and, \* in my opinion, the offer

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<sup>1</sup> [Williams v. Box of Bullion, 6 Law Rep. 363.]

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The Mary Ann. 1 Hagg.

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of 50*l.* was not only commensurate, but liberal, and I pronounce for it.

Costs of salvors refused.<sup>1</sup>

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\* MARY ANN, Ferrier.

[ \* 158 ]

June 24, 1823.

By the law of England, king's ships are entitled to a salvage remuneration for services rendered to merchant vessels in distress.<sup>2</sup>

Principle of remuneration in salvage cases.

THIS was a case of salvage, in which important services had been

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<sup>1</sup> JOHN & THOMAS, Baxter.

December 11, 1822.

Sufficiency of tender. Expenses of salvors refused *in toto*, although partially incurred previously to the tender, and embraced in it.

THIS was a case of salvage, in which the court, upon a former day, had decreed that 100*l.* (which had been regularly tendered, together with the expenses of the salvors,) was a sufficient remuneration for the services of the commander and crew of H. M. revenue cutter Fox. It was now contended, upon the ground that the tender included the costs up to the time of making it, that the court pronounced for the tender, and the expenses it embraced, leaving the salvors to pay those which they might subsequently have incurred. On the other side, it was said that the practice was now settled that salvors were not entitled to costs unless the tender was accepted at the time. *Vrow Margaretha*, 4 Rob. 106.

When the cause was argued on the principal merits, the court was assisted by two of the elder brethren of the Trinity House.

For the salvors, *Adams and Gostling*.

*Lushington and Dodson, contra*.

PER CURIAM. The services, in this case, were little more than the unsolicited labors of the men, and the attention of their officer; but even services of the highest class might be lessened by subsequent misconduct, and especially by exorbitant demands. Here a demand of 800*l.* was made, and the court has decided that the tender of 100*l.* was a sufficient reward. Certainly, whatever was done, was done with propriety; but the offer of remuneration which was twice made by the owners was ample, and ought not to have been rejected. Under these particular circumstances, I am of opinion that the salvors are not entitled to any of their costs.

<sup>2</sup> [The *Thetis*, 3 Hagg. Ad. R. 14; *Lustre*, 3 Hagg. Ad. R. 154; The *Louisa*, 1 Dod.



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The Mary Ann. 1 Hagg.

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rendered by H. M. sloop Arab to a valuable English ship and cargo, on the west coast of Ireland.

JUDGMENT.

LORD STOWELL. In this case a demand is made for the remuneration of salvage services, which have been meritoriously effected by the commander and crew of H. M. sloop Arab; and, undoubtedly, the parties may fairly claim a remuneration, although the ship belongs to the state, and although there is an obligation upon king's ships to assist the merchant vessels of this country; yet, when services have been rendered, those who confer them are entitled to an adequate reward. They may not be so entitled in some other countries, as the law is there understood and administered; but the law is different in this country; and if it is not here considered to be inconsistent with public policy, it becomes the duty of the court to accede to it, and to administer the law as it finds it. And if, in this case, the salvors were referred to the Lords of the Admiralty for the remuneration of their services, the owners of the merchantman must have acted under an erroneous impression of the law. The particular acts of seamanship I must leave to the consideration of the gentlemen of the Trinity House, by whom the court is assisted; but the general [\* 159] statement and history of this case is to be \* taken from the parties who received the benefit, and which they made at a time when the impression was strong and fresh upon their minds. Now, the declaration and protest are signed by four of the persons on board; and the master of the ship, who has no inducement to exaggerate the *quantum* of assistance, has not retracted his original representation. The chief mate alone has ventured to give a contradictory statement, in his second affidavit, a circumstance which makes it advisable to dismiss him altogether from the consideration of this case.

It appears that this valuable ship, with a valuable cargo, sailed from Jamaica on the 14th of October, and, from the commencement of her voyage, experienced very bad weather, and met with many distressing occurrences. On the 10th of November, a violent storm stove in her quarter-bow, and on the 18th her head was carried away. In the early part of December the weather became more tempestuous, and continued rough during the month. On the 28th, the wind

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317; The Francis and Eliza, 2 Dod. 117; The Clifton, 3 Hagg. Ad. R. 121; The Ewell Grove, 3 Hagg. Ad. R. 209; The Rapid, 3 Hagg. Ad. R. 421; The Wilson, 1 W. Rob. 172; The Iodine, 8 Notes of Cases, 140; The Ocean, 2 Month. Law Mag. 441; 4 Law & Eq. R. 581.]

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The Mary Ann. 1 Hagg.

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blowing hard from the south-west, the ship making much water, the men much exhausted, and short of provisions, the master found it necessary to bear away for Cork, the sails being split, and all hands at the pumps. On the 29th, the gale continued, the ship laboring and straining much, and the men unable to keep her free, the pumps being nearly choked with molasses. The master himself was ignorant of his situation, and the ship was drifting fast towards the rocks, when she fell in with H. M. ship Arab, which was cruising off the west coast of Ireland, in search of smugglers. An officer and sixteen men came instantly on board to her assistance. The \* gale increased, and the ship was scarcely kept from found- [ \* 160 ] ering; but, after three days and two nights of the greatest exertion, she is brought into Long Island Harbor.

It is impossible to describe a ship in greater danger; and, in my view of the case, she is released from it in a manner skilful and proper. She is carried into this harbor, the nearest that offered, and which the perilous situation of this vessel therefore rendered the fittest, but where, it is true, she could not get what was necessary for her repairs. She is, however, supplied by the king's ship, which leaves ten men on board to assist in doing what was necessary, and, during a continuance of three weeks, labor is furnished by the crew of The Arab for the repairs of this vessel. They assist both on board and upon the land, thus doing what would be done by other persons in other places better accommodated, and which the court cannot otherwise consider than as a valuable ingredient of service. The persons who were so employed are certainly numerous; a crew of more than eighty men claim to be remunerated, and I see no ground to exclude any. Those who were left behind enabled the ship to spare the others; and, though they might not themselves be engaged in performing the same degree of labor, it was in some measure owing to the benefit of the number that the service was so efficiently performed.

In regard to the proportion of remuneration, there are many cases in which there is much labor and little to pay for it; so that the court acts upon the principle of giving a larger proportion in cases of small value, than in cases where the property is considerable, as a due encouragement to the interests \* of the commerce and [ \* 161 ] navigation of the country. Here a valuable cargo has been preserved — part, undoubtedly, to the crown, inasmuch as the duties will be saved, and the revenue of the country proportionally increased. The court, however, bears in mind that there has been, in this case, not merely a preservation from the perils of the sea, but that services were afterwards performed on land; and I understand from the Tri-

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The Centurion. 1 Hagg.

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nity Masters that they were performed with very great propriety, and that there is no trace of misconduct in the salvors in any part of this long and laborious transaction. I am, therefore, of opinion that one tenth of the ship, her cargo, and freight, will not be an extravagant reward, and I direct that sum to be divided according to the prize proclamation in force on board the king's ships.<sup>1</sup>

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CENTURION, Wills.

June 30, 1823.

Charge of ill-treatment against the master of a ship not proved. Complaint dismissed with costs.

THIS was a cause of damage promoted by Pearson Kilvington, late chief mate of The Centurion, against the captain, for having assaulted him with a broomstick and handspike, during the voyage from Buenos Ayres to Liverpool. A libel, on the part of the complainant, and an allegation on behalf of the master, were [ \*162 ] admitted; and two witnesses \* had been examined in support of the respective pleas.<sup>2</sup>

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<sup>1</sup> Dated June 15, 1808.

<sup>2</sup> When publication of the evidence had passed, an exceptive allegation was offered on the part of the master. It set forth various declarations and admissions of the witnesses, that they had never seen the master strike or assault the mate. It more particularly alleged, that one of these witnesses had, since his examination, "voluntarily, unsolicited, and with a view of easing his own conscience," made an affidavit, that his deposition was false, and that he had given his evidence in conformity to the instructions and directions of the complainant. *Dodson* objected to its admission. Besides the suspicion attaching to all pleas at this period of a cause, there is here an attempt, quite of a novel nature, to set up a voluntary affidavit, made before a magistrate, in opposition to a regular examination. The witness is now gone to sea again, and there is no power of ascertaining under what circumstances his affidavit was made.

*Lushington, contrâ.* The affidavit is voluntarily made, and must be allowed to have the same effect as mere simple declarations, which are sufficient to discredit a witness. It was said in the case of *Brisco*,\* that the declarations of a witness, after he had given his evidence, were never received; but the court (Sir J. Nicholl) overruled that position, and observed, "that it was the admitted practice in all courts to receive declarations in opposition to evidence on oath: they may be confirmed by other circumstances;

\* *Brisco v. Brisco*, *Arches*, February 6th, 1818. On exceptive pleas, see 2 Phill. 145. 1 Consistory Reports, 95.

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The *Bulmer*. 1 Hagg.

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For the mate, *Dodson* submitted, that the assaults were fully proved by the witnesses in support of the libel, and that the claim of of the mariner to some compensation was established.

*Lushington, contra*. This claim is totally without \*founda- [ \* 163 ] tion ; the *onus probandi* lies on the party charging misconduct. Here there are two witnesses opposed to two witnesses, and neither of the witnesses, examined upon the libel in support of the charge are worthy of credit.

#### JUDGMENT.

LORD STOWELL. This is a most gross case. If the perjury of the witnesses, brought forward to support this charge, had not been discovered, it might have ended in the total ruin of the master. The falsehood of their testimony is quite manifest from the facts of the exceptive allegation. I pronounce against the complainant, and with costs.

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BULMER, Brown.

June 30, 1823.

Forfeiture of wages incurred by a mariner, who neglects or refuses to return to his ship, when demanded by the master, although previously absent with leave.

THIS was a cause of subtraction of wages promoted by William Lundin, late mariner in the above ship, against Thomas Brown, the master. The summary petition alleged, that in December, 1809, The *Bulmer* being in the transport service, Lundin was hired at the port of London, by Brown, to serve as carpenter's mate, during any voyage upon which the ship might then be ordered, at the rate of 4*l.* 10*s.* per month. That after having disembarked some troops at Lisbon, the transport \*proceeded to Tangier in Africa, and [ \* 164 ] made several voyages from thence to Cadiz. That Lundin continued in the service of the ship during these voyages, and until

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and no one can say that they are of light and slender importance : they go in abatement of credit ; and although declarations coming after publication were weakened, yet on that account they were not to be excluded."

*Allegation admitted.*

the 29th of February, 1812, when he finally quitted the ship with the consent of the master, having a balance of wages then due to him of 35l. 6s. 6d., and that he arrived in this country on the 5th of September, 1818, for the first time after he had quitted the service of the said ship.

For the mariner, *Addams*. The whole question turns upon the employment of Lundin, from September, 1811, to January, 1812, whether, in this interval, he was acting under the orders of Brown, while he was working as a joiner for Mr. Green, the consul at Tangier. The main facts are undisputed; the hiring, the rate of wages, the conduct of the man while on board, the period from which wages are to run, and their ending; for it is admitted by the opposite party, that he returns to his duty on board, and remains with the ship till the following March. The adverse plea does not go to a case of desertion. It is true, that it is just thrown in as a word, when it denies that any balance of wages was due to Lundin; but, in its main result, and in its effect, it turns upon the antecedent wages; and the schedule of wages that is annexed is so made out, containing a correct statement of the advances and wages that had been supplied. This is the very operative evidence; it shows upon what ground each party goes: they state that the wages were due for twenty-one months and twenty-two days; we demand them for twenty-six months and nineteen days. In March, Mr. Green obtains

Brown's permission for Lundin to go to Fez to work for the [ \* 165 ] Emperor of Morocco; but the master retains the power of demanding his return, and in case of a refusal, he was entitled to call upon the consul for his assistance; so, that if desertion be set up, I am ignorant at what period it was consummated, or out of what it was to arise; for, in order to establish it, there must be a quitting disobediently done, and that cannot be made out in this case. The opposite party never would have rested their case upon a balance of accounts, if they had one sweeping objection to the whole claim. If Lundin was earning wages for himself on shore, as against the ship, without the privity of the master, that would make a difference; but he was not gaining a rate of wages, and there was no suspension of the contract, much less a desertion. It is to be presumed, that the consul would not have taken him without permission of the master; but it is sworn, that permission was given. And it is also to be presumed, that he would not have kept him without such acquiescence and concurrence. The periods of absence are, therefore, sufficiently accounted for, and they were recognized by the acquiescence of the master.

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The *Bulmer*. 1 Hagg.

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*Lushington, contra*. The sum in dispute is undoubtedly small, but this mariner is not entitled to it. It is said, that we have not pleaded desertion. Now, in the first article of our allegation, we plead, "that on the 6th of March, 1812, Lundin left the ship, not only without the knowledge or consent, but against the express orders and directions of the master, and did not again return;" and, in the second article, that "after he had so deserted he was frequently ordered to come on board, but on all such occasions he refused to \*re- [\* 166.] turn to his duty." Desertion then was the refusal to return.

We also clearly prove that he quitted the ship without consent, though, when the master found him on shore, we admit that he was permitted to remain; but this was a special permission for some particular work. The evidence of Mr. Green up to March, 1812, may have weight with the court; but after that period he was absent himself from Tangier, and could have no personal knowledge of what passed between Captain Brown and the carpenter; and we have abundant evidence, that upon Lundin's return from Fez, between April and August, 1812, there were distinct and repeated demands made for him to come on board, and distinct refusals on his part. There is no contradictory evidence upon this part of the case. His constant reply was, that he was too advantageously situated to come back to *The Bulmer*. The schedules were annexed to the pleas, because from the great lapse of time, it was uncertain whether the desertion would be established in proof; it is, however, satisfactorily proved.

#### JUDGMENT.

LORD STOWELL. I am of opinion that this claim cannot be supported. It appears that this man Lundin, having been hired as carpenter on board a transport, sails with her; and, in the course of her voyages, arrives at Tangier on the coast of Africa; and while the vessel was at that port, application was made for his services by Mr. Green, the British consul at that place. The master, Brown, gives him permission to perform the services that are required of him, and while they lasted, though he \*was not actually [\* 167.] employed in the service of the ship, yet he might be considered, in a liberal view of the case, as entitled to his wages, unless they were forfeited by his subsequent misconduct. It does not appear that there was any specific mention of a return to the ship; but it belongs to the nature of the thing: he who retires under a permission, goes with the stipulation of a return when the ship requires him.

The case then is reduced to a question of fact, whether the per-

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The *Bulmer*. 1 Hagg.

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mission was withdrawn; and I am of opinion that there is distinct evidence that it was. Applications are made to him to return, and his answers are a distinct refusal,—that he had better employment and would not return. The boatswain says, he was directed by the captain to require Lundin to come on board; and that when he delivered the captain's message to him, he replied, "that he would not return to England until he had made his fortune in the service of the Emperor of Morocco; that he was sure of making his fortune, and that he would give the deponent leave to behead him if he did not make it." And it must, I think, be much easier to be beheaded at Morocco than to make a fortune. His refusal to work any more on board the ship, seems, from the evidence of the mate, to have been given in terms of reproach; and to have been accompanied with most vehement language. It is not then for such a man, at the distance of a great number of years, to make the claim now before the court; a man who had received a variety of indulgences from his master, and who, when called upon to return to his proper duty, refused to return; and I say again, that the permission of [\*168] absence that was given to him was \* to be considered as accompanied with an implied obligation of return. The court will not countenance this claim, and it dismisses Mr. Brown from any further demands of this man.<sup>1</sup>

*Lushington* prayed costs; the expenses may otherwise fall with great weight on the bankrupt owners.

*Addams* said, that it might well be doubted whether, after so many permissions had been given to his party, the master had not, by his

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<sup>1</sup> In *The George, Banifer*, — a suit for seaman's wages was resisted by the owners on the ground of his desertion. The seaman was hired at Valparaiso, to serve, as he alleged, for one twelvemonth only, at the rate of 20 dollars per month; but the owners pleaded, that he was hired to serve for the remainder of the voyage, and although they produced no proof whatever as to the time of service, they contended, that the conduct of the seaman showed that there was no direct hiring for the specific period of one year; for the vessel returns to the port where he was hired, and he never applies for his wages, but resails with her, and remains fifteen months on board; the desertion of the captain himself in S. America, with all the ship's papers, has disabled the owners from producing documentary proof.

PER CURIAM. There is nothing in this case to show the nature of the mariner's contract, so that a breach of it can appear; the ship's articles are brought in, but this man's name is not in them; and the owners have failed to prove any agreement, as to the time of service. It cannot then with effect be argued as a case of desertion and consequent forfeiture, and I pronounce for the wages schedule.

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The Nelson. 1 Hagg.

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conduct, allowed him to understand that the permission of absence was continued.

The court gave the master's expenses.

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\* NELSON, Brown.

[\* 169 ]

July 2, 1823.

A bottomry bond given to a consignee of the cargo, there being also a consignee of the ship, upheld. The material objection,—that the lender knew there was not an unprovided necessity,—overruled.

Sufficient description of sea risk by the terms, "after the arrival of the ship at her port."

THIS was a suit instituted by Messrs. Phillips & King of London, merchants, the holders of a bottomry bond upon the above ship and freight.

It was alleged in the act on petition, that the ship, whilst in Table Bay, sustained considerable damage on 29th June, 1822; that the master, being unprovided with the means of defraying the expenses of the repairs, applied to Daniel Phillips, a merchant of Cape Town, to lend him 500*l.* on bottomry, for that purpose; "as also for a cable, sails, port charges, and other small debts incurred by the said ship since her arrival in this bay from the port of London;" that the sum was accordingly advanced; and on the 23d August, the master duly executed the bond, "binding himself and the owners of the ship, their heirs," &c., &c.; and also "the ship, her tackle, apparel, and furniture, and any freight which she might thereafter earn," for the repayment of the sum within one month after the ship's arrival in any port of discharge in Great Britain, with interest at 5 per cent.; that the vessel arrived in the port of London on 13th November, and has earned a good freight; and that neither the master, nor John Campbell, the owner of the ship, have discharged the bond; nor hath J. C. accepted a bill of exchange drawn by the master as a collateral security. On the part of the owner of the ship, it was denied, that the master had incurred any necessary expenses on account of the ship, for which he had not a sufficient credit, or \* that [\* 170 ] 500*l.* was expended for her use; and it was alleged, that, by the charter-party, it was expressly agreed, that all port charges for the ship at the Cape should be paid by Mr. Smith, the charterer; that the cargo was consigned by him to Daniel Phillips, and that the ship



was consigned by Campbell to Henry Nourse, accompanied by a letter of 5th March, which contained this passage: "Should The Nelson require any provisions or stores for her homeward voyage, Nourse & Co. would draw on him in case the captain could not pay for them; but not to advance any money for the captain's private concerns on account of the said J. Campbell." The letter of instructions to the master directed him to consult Nourse on every occasion; and further stated, "I hope your expenses at the Cape will not be much; and, should your own little adventure not be equal to pay it, in that case, you will apply to Mr. Smith's agents, and in the event of their refusing to pay you any money on account of the charterer, you will then apply and receive from Mr. Nourse what may be absolutely necessary for the use of the brig only;" that the master delivered the letter to N. & Co.; but, contrary to the owner's directions, and without the knowledge of N. & Co., he placed the ship, and the interests of J. C. into the hands of Phillips, who well knew that they had been consigned to N. & Co., and that the master had, at such time, a credit open with them; that the master on the 23d July, applied for the first time to N. & Co. for assistance, who purchased him a cable for the use of the ship, and undertook to supply her further reasonable wants, upon an understanding that their responsibility rested [ \* 171 ] upon their previous sanction to what should \* be furnished; that, subsequently, Brown, in concert with D. P., and without the knowledge or concurrence of N., gave orders to different tradesmen for various articles on account of the ship, and on his (B.'s) own account; that about 23d August, 1822, bills upon London at Cape Town were at 170 per cent., and that D. P. being desirous of taking advantage of B., and of making a profit on the exchange, offered to advance him 500*l.* upon bills on J. C., at 140 per cent., and provided B., as collateral security, in case of the non-payment of the bills, would give him a bond of hypothecation, in which case D. P. undertook that no commission should be charged for any of the supplies; that B., knowing that by thus paying the bills himself, and in ready money, he should effect a saving of 10 per cent., entered into this arrangement, upon the agreement that the money should be paid into his hands; that the bills were accordingly drawn, and the bond executed, when D. P. refused to pay B. the money; but informed him, "that all the accounts were to go through the hands of N. & Co., to whom he said he should pay the sum;" that in the account current the articles are charged at too high a rate, and that many of them are furnished for the use of the master; and that no discount is allowed for prompt payment; that on 24th August, Phillips charged Brown for the insurance at the Cape of the 500*l.* at the rate of ex-

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The Nelson. 1 Hagg.

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change, at that time at 160 per cent.; that further, there being no stipulation in the bond, that the same should be void, in case the ship was lost, the same is invalid. The bond-holder replied, that when the master applied to N. & Co. for money, they refused to assist him, on his declining to give them a \* bot- [ \* 172 ] tomry bond which they required; that government bills, drawn on the lords of his Majesty's treasury, fetched at the last issue, on 6th August, 150 per cent. only, and that bills on London, of and on individuals, varied in value according to the reputed credit of the parties, and it being well known that the master and ship-owner had both recently been bankrupts, the value of 140 per cent. was as liberal an exchange as could be procured for their bills, although accompanied by the collateral security of a bottomry bond. The remaining averments of the other party were contradicted and denied.

For the bond-holder, *Arnold & J. Addams*. The execution of the bond is not denied nor impeached; but an objection is taken to its form; and, undoubtedly, it is an essential quality in a bottomry bond that the sea risk should be incurred by the lender; there is, however, no certain and specific form of words in which to express it; these bonds are drawn according to the precedents of different individuals; and if this essential quality is found in them in substance, it is sufficient to give them validity. If the ship is lost, the day of payment cannot arrive, because the ship does not arrive. The words that have been adopted in this form, "after the arrival of the ship," are, therefore, tantamount to an express stipulation. The master is not trustworthy; he has spoken doubly; but it is quite clear, that without a bond no money could be obtained. We admit, that if a bond is given at a place where the master has credit, and the owners an agent, it is not legal; but with this limitation, that the party advancing it has knowledge of such fact; here the master had no personal credit, and the correspondence proves, that he had [ \* 173 ] no other choice than to grant a bond to some one. Nourse & Co. were displeased with him, and would not advance any money except on a bottomry bond. They do not interfere with Phillips, (whose conduct is unimpeachable,) and there is no expression of dissent, nor avowal of the consigneeship on their part. As soon as the money is obtained, every thing is put into its proper training; it is placed in the hands of Nourse & Co., and the bills are paid by them; they have sanctioned the whole concern, and have actually credited Mr. Campbell for the money; we ask for it back again with interest. If the agents paid any of the private debts of the master, that would be a good ground of objection between Mr. Campbell and them, as

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The Nelson. 1 Hagg.

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being in direct opposition to his letters, and as a misapplication of his funds; but the bond-holder has nothing to do with their accounts.

*Lushington and Dodson, contra.* The bond is invalid; 1st, Because there is no clause of stipulation with respect to the sea risk. 2d, No money can be lent to a master upon bottomry, if there is a personal credit of himself, or of the ship-owner; and here the owner had an agent at the Cape of Good Hope, who not only had the funds, but who, as we contend, was willing to make the fair and necessary advances; but we deny that the money in question has ever been paid, or that the expenses ought to have fallen upon the ship. 3d, No merchant, who is consignee of the cargo, is at liberty to advance money to the captain, when there is a consignee of the ship, without first consulting him, and obtaining his sanction. They argued upon these positions, and relied upon the fact of Nourse & Co. having a balance of 166*l.* in their hands; and also upon their supplying the new cable to the ship; and they urged the great mischief that would arise to ship-owners, if their captains were able to raise money with too great facility; that, in this case, Phillips had improperly interfered, and encouraged Brown in extravagance, and, in collusion with him, finally took the bottomry bond, but had not produced any account current. They then adverted to the rate of exchange, and to those stipulations in the bond which were contrary to the charter-party, and also contrary to law (*ante* 169) — and to the insurance of the bond — an improper charge upon the owner; and submitted that there was no *bona fides* in any part of the transaction, and that it could not be sustained, so as to affect the owner of the ship.

In reply, it was said, that nothing in the shape of collusion ever suggested itself to the mind of Nourse & Co., or to the owner of the ship, with regard to this business; and it was idle to suppose it upon an advance of money at such a rate of interest; and Nourse & Co., in their last letter upon this subject, expressly state, “that they do not mean to insinuate that there was any thing incorrect in the disbursements;” but the question was not whether there was *bona* or *mala fides* on the part of Phillips; — and the necessity of a bottomry bond did not seem to be denied.<sup>1</sup> The terms of the bond may be inaccurate; but they are the same as are usually adopted.

[ \*175 ] JUDGMENT.

LORD STOWELL. This is a proceeding to recover upon a

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<sup>1</sup> The necessity for a bond was fully admitted in the argument before the Court of Delegates.

bottomry bond, given at the Cape of Good Hope, on a ship meaning to return to the port of London, a voyage which she accomplished; and on which the present suit has been commenced, in consequence of the refusal of payment. This ship being the property of Mr. John Campbell, and commanded by a Captain Thomas Brown, had sailed from London to the Cape with a cargo belonging to Mr. John Smith; and by the charter-party, which had been modified by verbal agreement after execution, was to return immediately to London to the charterer with a cargo on his account. The ship was consigned to the house of Nourse & Co. at the Cape, and the cargo to the house of Phillips & King. She arrived in Table Bay in June, 1822, and there suffered much damage in a violent storm in that month, and in a still more violent one in the month of July, — so much damage in both as to require repairs of an expensive nature. The master takes up the sum of 500*l.* upon the security of this bond for payment of these repairs, and of the stores necessary for the reëquipment of the ship; and he takes up this sum from the consignee of the cargo, and not from the consignee of the ship, to whom he was immediately addressed. And this constitutes the main objection to the obligation of the bond.

It is certainly the vital principle of this species of bonds, that they shall have been taken where the owner was known to have no credit; no resources for obtaining necessary supplies. It is that state of unprovided necessity that alone supports these bonds: the absence of that necessity is their undoing. \* If the master [ \* 176 ] takes up money from a person who knows that he has a general credit in the place, or at least an empowered consignee, or agent, willing to supply his wants, the giving a bottomry bond is a void transaction,<sup>1</sup> not affecting the property of the owner, only fixing loss and shame on the fraudulent lender; but where honorably transacted, under an honest ignorance of this fact, an ignorance that could not be removed by any reasonable inquiry, it is the disposition of this court to uphold such bonds, as necessary for the support of commerce in its extremities of distress, and as such recognized in the maritime codes of all commercial ages and nations.

To the bond exhibited here, some objections are taken respecting its form, but not affecting its validity. One objection is, that it binds the owners personally, as well as the ship and freight, which it cannot do. That is held in this court to be no objection to the efficacy of what it is admitted it can do. Here we do not take this

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<sup>1</sup> [The Sydney Cove, 2 Dod. 1.]

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The Nelson. 1 Hagg.

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bond *in toto*, as is done in other systems of law, and reject it as unsound in the whole, if vicious in any part. But we separate the parts, reject the vicious, and respect the efficiency of those who are entitled to operate.<sup>1</sup> The form of these bonds is different in different countries; so is their authority. In some countries they bind the owner or owners, in others not; and where they do not, though the form of the bond affects to bind the owners, that part is insignificant,

but does not at all touch upon the efficiency of those parts [ \* 177 ] which have an acknowledged operation. It is objected likewise, that this bond does not express the obligation to be on the sea risk, and it does not expressly, or in exact terms; but it does in terms amounting to the same effect. The money is to be paid at such a time "after the ship arrives at her port." If the ship never arrives at her port, or is lost upon the voyage, that is a sufficient description of sea risk. I take no notice of the other objections made to this bond: they are objections invariably paraded on these occasions, and as invariably overruled by the court.

The material objection here is not the form of the bond, but something extrinsic—the absence of all necessity, and the absence of that necessity known to the person who advances the money;—for it is argued that the lender knew that the master had other means of supplying himself, and, therefore, ought not to have resorted to this disadvantageous mode of supply, and in truth had no authority to resort to it; and if the master has used fraud, his owner is not to be the victim of his dishonesty; but the person on whom it is practised. Now, in the present case, it certainly is not pretended that there was any general credit, but there was a consignee and correspondent; and if he was duly empowered to act in supplying what the necessities of the ship might require, and inclined so to act, for there must be both, then there was no defect of credit. It is asserted that such a person there was, a Mr. Nourse, a merchant there, pointed out to the captain by his letter of instructions. That makes the instructions highly important. Do they convey such an authority, and was that authority assumed in consequence? The whole case turns upon these questions.

[ \* 178 ] The instructions are exhibited, \* together with much other correspondence, and I cannot infer from any part of the instructions or correspondence, that Mr. Nourse had such a character substantially conferred upon him, and still less that it had been accepted. It appears that Mr. Campbell had been introduced very recently to Mr. Nourse, by a brother of that gentleman, Commodore

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<sup>1</sup> *Supra*, p. 14. See also Abbott on Shipping, p. ii. c. 3, s. 23.

Nourse, of London, with the hope that it might lead to a friendly correspondence of business. The acquaintance, however, was quite in the bud; a small transaction appears to have preceded the present, there being a balance of 166*l.* in Mr. Nourse's hands, the relic of some small previous adventure, which he remitted in the course of these transactions.

When the ship reached Table Bay, Mr. Nourse was not there, he having gone to Symond's Bay to meet Commodore Nourse, who had just arrived there. The captain could not, therefore, deliver the letter from Mr. Campbell to him, but he delivered to Mr. Phillips the letter from Mr. Smith, the charterer. It is likewise said, though not distinctly proved, I think, that he showed him his letter of instructions. The captain is, certainly, a sufficiently loose person, both in his words and actions, for there are two contradictory affidavits of his in this cause; but I cannot charge him with a deviation from his instructions. In these instructions it appears clearly that Mr. Campbell had not the slightest suspicion of any large expense that was to arise. He seems to have thought Table Bay a tranquil region untroubled by storms, where nothing could arise productive of any inflated demands upon him. The resources he points out to him are of the most scanty and restricted kind; the captain's own small adventure is the resource provided for all evil chances, and if [ \* 179 ] that is insufficient, what is he to do? to apply to whom?

to Mr. Phillips, the agent of the charterer, and it is only if he refuses that he is to apply to Mr. Nourse. In his letter to that gentleman he speaks in the same style of extreme moderation in his calculation of expenses; storms and tempests never rise to his imagination as possible events. A small matter, the surplus of the captain's adventure, was to frank every thing that could happen under the utmost malevolence of fate. Now, upon such a letter a correspondent could hardly venture to consider himself authorized to advance a sum so far beyond all estimate of the proprietor himself, and that estimate expressed in terms that fairly amounted to a prohibition of any such expenditure; at least it is no authority for such an advance. If the consignee ventured to make it, it must be considered by himself in making it as an adventure.

Bills of exchange were drawn, as is not unusual in such cases, as collateral securities;<sup>1</sup> if honored they discharged the bottomry. The bill of exchange is quarrelled with as not being drawn at the then existing rate. I think it appears pretty clearly, that if this objection

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<sup>1</sup> See *The Tartar*, p. 4, and the cases cited *arguendo*.

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The Nelson. 1 Hagg.

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was not what it is contended to have been by Messrs. Phillips & King, the only objection to the settlement of these engagements, it was at least the principal objection offered on the part of Mr. Campbell; the weight of the objection I shall leave to be determined by the registrar and merchants who have much better means of ascertaining

it. But, without interposing any confident opinion of my  
 [ \* 180 ] \* own, I think the objection is not strongly supported by any judgment I can found upon the evidence respecting it. The government bills are stated to have been at 150 at that time at the Cape, and they are, undoubtedly, securities of that kind of the highest class; a different consideration may reasonably belong to the bills of individuals; and here it appears, that Mr. Campbell and Captain Brown had both experienced recent misfortunes, which had the common effect of lowering the value of bills upon them. It is no small confirmation of the fairness of the transaction in this part of it, that repeated offers were made by Mr. King, the partner of Mr. Phillips here in London, to refer this question of bills to merchants here conversant in the business of the Cape. These offers were met by a requisition from Mr. Campbell upon Mr. King, to produce the account of disbursements upon the ship's repairs, which of course he could not possibly do, his partner having had nothing to do with those disbursements, but having left that matter entirely in the hands of Mr. Nourse, to whom he delivered over the 500*l.*, and the duty of examining the whole subject of disbursements; and with whom the accounts either remained at the Cape, or were transmitted, as now appears to be the fact, to Mr. Campbell in London. There may, as I have observed, be some extravagance in them; but 500*l.* does not strike me as a very revolting charge for the effects of two violent storms in that bay, so immediately following each other. I cannot dismiss this part of the case, without adverting to a rather novel display of mercantile disin-

• terestedness on the part of Nourse & Co. In the letter to  
 [ \* 181 ] Mr. Campbell at the close of this \* transaction, they inform him, that they required a bottomry bond for their security, "but without any interest whatever;" an offer of money without any interest, what can that mean? It is the most unmercantile transaction imaginable; on Change it would work the effect of the miraculous ages to offer money without interest.

Much intercourse and correspondence passed here in London, into which I am not inclined to look minutely, satisfied as I am with the integrity of the original transaction at the Cape. The suspicion of any impropriety adhering to it there, rather appears to be an after thought; for it does not appear distinctly either in the act, or in the letters. There is a slight degree of displeasure expressed in the letters against

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The Eliza. 1 Hagg.

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the captain for doing what in truth he did not do — putting all the concerns of the ship into the hands of Mr. Phillips; but no complaints were directed against Mr. Phillips; his integrity and conduct are not at all impeached. It appears to me, the only guilt imputable to him is, that he furnished the money when nobody else would; acting in that respect for the interest of Mr. Campbell, as well as that of his own correspondent, the charterer, Mr. Smith; and providing for the proper application of the money by putting it into the hands of Mr. Nourse, who, of course, had full power and means to check and control any undue expenditure. I shall, therefore, pronounce for the validity of this bond; together with the expenses of the bond-holder; and I refer the accounts to the registrar and merchants for their examination.

The counsel for the bond-holder submitted, that it was not usual to refer accounts to the registrar \* and merchants [ \* 182 ] that had not been exhibited in the cause; but the court did not sustain the objection, and observed, that it was proper that the accounts should be audited, and if the bond-holder was affected, it was open to him to make an application to the court at a future time.

Affirmed, on appeal, with costs.

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ELIZA, Ireland.

July 24, 1823.

Upon the alteration of a mariner's contract at a foreign port, a forfeiture of wages — on the ground of desertion — not sustained.

THIS was a case of a mariner's wages. The allegation stated, that in June, 1819, while The Eliza was in the port of London, and bound "on a voyage to Norway, from thence to the Mediterranean and back to England," George Miller was hired for such voyage; that upon the arrival of the ship at Trieste, she took in a fresh cargo, and proceeded on her voyage ostensibly for England; that she put into Gibraltar, where she was reported at the customs, "as bound for England;" that instead of so proceeding, she altered her voyage and went to Norway; and that on the arrival of the ship at Bodoe, the master suggested, that the vessel might perhaps go "to Holland, the Mediterranean, or elsewhere;" that at the port of Bodoe, the master refused to accede to repeated applications of the men for their wages;



and at length, there being no provisions on board, Miller and several others were under the necessity of quitting the ship; that, [ \* 183 ] \* accordingly, they went on shore, where they remained living upon charity for about a fortnight. It was pleaded, responsively, that no arrangement whatever was made as to any further voyage beyond "any port or ports in the Mediterranean;" that the master intended to proceed from Trieste back to the port of Bodoe, touching at some port in England; but that, owing to a variety of causes, despairing of this, he distinctly informed the mariners that he should not touch at an English port, and they consented to remain with the ship; that thereupon he inserted in the articles the words, "elsewhere and back to the port of London;" that on the arrival of the ship in the latitude of the British Channel, the wind being fairer for proceeding north about, than up the English Channel, the master adopted that course to Norway; that at Bodoe he engaged to carry another cargo to Trieste, and while it was lading, Miller and three other seamen became extremely unruly, insolent, and disobedient, and demanded their discharge; that he was not willing to let them go; but their conduct ultimately became so mutinous, that he applied to the magistrates at Bodoe, who pronounced that the men had forfeited their wages; that the agent of the ship supplied each of the men with some bread, some money, and a passage to Drontheim, at which place they could get employment, or procure a passage to England.

*Dodson*, for the mariner. The ship's articles bear an insertion, which the master alleges to have been made at Trieste, with the consent of the mariners; but this is denied by all the witnesses [ \* 184 ] examined upon the mariner's plea, and it is not \* supported by the only adverse witness; neither is there any proof of a rehiring at that port. The vessel sailed from England in 1819, and has not since returned. The man suffered great hardships in his way to this country, so that he is entitled to some compensation in addition to his wages.

*Lushington, contra*. There is sufficient proof of the bad conduct of this mariner to induce the court to dismiss his claim altogether. It is quite clear that Miller and the rest of these men would have remained on board, if the master would have paid them their full wages; but, by act of parliament he is restricted to the payment of a moiety in foreign ports.<sup>1</sup> The grounds upon which the men quitted the ship,

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<sup>1</sup> 8 Geo. I. c. 24, s. 7, made perpetual by 2 Geo. II. c. 28, s. 7.

are much accumulated; but that they were kept out beyond their wishes, is not averred in their plea; and no reliance can be placed upon the witness in its support, as they have made similar demands. A continued absence of the mariner during twenty-four hours is a forfeiture of his wages, both by the ship's articles, and by the 2 Geo. II. c. 36, s. 3.

\* JUDGMENT.

LORD STOWELL. I must pronounce for the claim of the mariner; very unfortunately, I think, for the owners, who seem to have put their affairs into the hands of a person so incapable of managing them as the captain of this vessel. The first question is, whether this man quitted the ship under circumstances that justified his desertion? I do not use this expression so as to show that he is not entitled to claim his wages; but the word is used \*indifferently, [\* 185] to signify the abandonment of the ship. Was he then entitled to abandon her? Much matter insignificant to the real question has been inserted in the plea, and has been rather urged in the argument — that the man quitted the ship in an ill humor, and conducted himself with incivility to his captain. Now, it is well known, that persons of this class do not use measured terms; and the captain gave as good as were brought, or rather, I should say, he was first beginner. What the evidence should have been directed to was the contract; whether there had been any waiver of it by the seaman; for it is not the use of intemperate language that touches the merits of the case, unless at a very great distance. The evidence in this cause, it has been said, may be all fallacious; for that three of the four witnesses are interested, having a similar question at issue; but the court can find nothing upon the interrogatories that comes up to the principal merits of the question.

How does the case stand upon the evidence of the single witness examined for the owners? Magnus Paul, who describes himself as an elderly man, says that he was ready to go anywhere, that he knew nothing about the articles, nor what was the nature of the voyage, nor where it was to end. He is, therefore, in a state of total ignorance. The original articles clearly were from London to a port in Norway, and then to the Mediterranean; but the master makes an alteration, and a pretty considerable one, by inserting the words, "or elsewhere," terms which must at least receive a determinate signification; for the court holds that the mariner should know where the voyage is to be directed — an observation which is sufficient to dispose \* of the present question.<sup>1</sup> The master has [\* 186]

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<sup>1</sup> See *The Minerva*, Bell; and George Home, Young; *infra*.

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The Jane and Matilda. 1 Hagg.

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since been in different parts, and at this day and hour is not heard of. I again regret, that the owners should have so misplaced their confidence; but I am under the necessity of pronouncing for the wages that are prayed.

*Lushington* hoped the court would only pronounce for the wages up to the time of the man's quitting the ship, as he voluntarily left her, and was supplied with some money and bread, and had other assistance till he reached England; and now wages are claimed for ten months after he left the service of the owners.

Court. If the seaman had a right to quit the ship, (and he was refused provisions while he was on board,<sup>1</sup>) he had a claim upon the owners to be restored to his home: it appears, that he was furnished with provisions as far as Drontheim, but, in point of principle, he is entitled to them till he arrives in this country. I will allow him half of his wages from the time of quitting the ship.

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[ \*187 ]

\* JANE & MATILDA, Chandler.

July 12, 1823.

**Mariner's wages.** Legal power in a female sailor to earn wages in such capacity; claim substantiated against a bankrupt estate.

THIS was a case of mariner's wages claimed by a female.

In December, 1821, proceedings were instituted by Elizabeth Stephens, spinster, in a cause of subtraction of wages, which she claimed for services as cook and steward on board the above-named vessel. The owners having become bankrupts, the action was defended by their assignees. In the original attestation of the woman, she swore to a debt of 64*l.* 14*s.*, but in the schedule annexed to the summary petition, (which alleged her having been shipped and hired on three successive voyages, between the 17th of May, 1817, and the 30th of October, 1821,) the amount was stated at 91*l.* 2*s.*; and this latter account was corroborated by three certificates of the master, that she had been shipped and hired on each voyage as cook and steward, at

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<sup>1</sup> See *The Castilla*, *supra*, 61.

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The Jane and Matilda. 1 Hagg.

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the wages of 2l. 5s. per month. Four witnesses were examined in support of the summary petition. The opposite party only offered one allegation, which was exceptive to the testimony of Chandler, the master, and principal witness for the woman; and on 28th January, this allegation was rejected. The cause was then assigned for hearing, when, on 29th April, the court was moved to allow it to stand over till after the next sessions at the Old Bailey; on the ground, that a bill of indictment for perjury had been found against the master. The court said, that it would not put off this case indefinitely: the first bill of indictment was thrown out, and the master is stated to be now absent from England. If this \*matter is not determined at the next sessions, I shall not [ \* 188 ] postpone any further the hearing of this cause. The case came on for argument without any fresh evidence.

In support of the claim, *Lushington*.

For the assignees, *Jenner*.

#### JUDGMENT.

LORD STOWELL. I am driven to the necessity of giving a decree in this case, which I would gladly have avoided. It is a case that presents itself upon evidence on one side only, and on a claim, which I have no particular wish to encourage, for man's work done by a female, and under circumstances which, if generally brought into practice, might lead to a good deal of moral disorder, with all the consequences likely enough to flow from it. It is likewise a claim against a bankrupt estate, in which the parties resisting the claim have produced no evidence, and in truth have offered none but such as could not be admitted without a breach of the established rules of practice in this court. If due diligence and attention have really been used in procuring evidence, I can only say they have been unsuccessful in their results: and that, I think, would have been a reason for acceding to something of a private compromise. However, no regard has been shown to the intimations which I have thrown out to that effect, and I must follow the course which the parties have prescribed to me.

It is a claim, as I have said, for man's work done by a female, and this work done on board a ship in two capacities, — one as cook and steward (for these are united offices,) the other as keeper of the ship and her stores in harbor or dock. The \*two first [ \* 189 ] employments combined, are not thought derogatory to the female character when their offices are performed on land; for they

are so performed in most families under the corresponding titles of cook and housekeeper. But they are employments very rarely so filled on board of ships, and it is desirable that they should so continue, for the reason already alluded to, that if the practice became frequent, it might be too likely to convert ships into places of irregular indulgence. There may be occasion enough to fear, that the lawful commands of the master would not be the only commands to which a ready obedience would be given. But if the fact has been that the captain has had the entire management of the ship given up to him, without any attention on the part of the other owners; and has employed such a cook and steward, without objection from them; and if the service belonging to such employments has been actually and properly performed, and the expense of another cook and steward saved to the ship and her owners, it is surely too late to object to the payment of the wages ordinarily due for such services, merely on the ground of the sex of the person employed in performing them. The work has been done, and well done; and being so, I hardly conceive that such an objection is legally maintainable. It may be said, and has been said, that the person acting aboard, acts (and is expected to do so) as mariner likewise. It will appear upon the evidence that this person did so in a great degree. The witnesses speak to exhibitions both of skill and strength, in her serving her due time [ \* 190 ] in her turn at the helm, and in lending her hands, \* which were sufficiently robust, at the pulling of ropes upon the deck.

The other capacity in which she served, is that of shipkeeper for a long space of time, in which the vessel remained in dock or harbor, during all which time she had the business of keeping the ship clean by frequent washing, and of looking to the safe custody of the stores left on board. This is an employment not usually consigned to females, though there is some evidence that women do live on board ships in such situations with their families, and occasionally perform such duties: and I do not see why, if they actually have performed the services without objection, the objection of the sex should be urged in bar of the ordinary remuneration; or why the shipkeeper is to be pennyless any more than the housekeeper.

The first witness is the captain; certainly a person on whose evidence I am not inclined to rest much, though I do not see that it is very forcibly impugned, either by the manner in which he has given it, or by what is extorted from him on the cross-examination. There may be reasons enough to suspect that he engaged the services of this woman in more capacities than those he has described. I say, to suspect; because it certainly is not proved and cannot be so taken:

whether she acted in the character of wife, or in a less honorable connection, seems hardly settled even in conjecture. He sometimes, though rarely, called her "wife," which, he says, he did from her connection with the ship in a capacity which would entitle a man to be called a ship's husband, and no otherwise. He has declined to answer a searching question respecting his intimacies with her; and \* nothing can be inferred from his use of his legal [ \* 191 ] privilege in so declining. It is, therefore, unnecessary for me to inquire how far such a circumstance, if proved, would destroy the claim for services actually performed of an unexceptionable and useful nature. The substance of the captain's evidence is this: he says he hired her in *The Catwater* at Plymouth, on a coasting and trading voyage; he agreed to pay her 2*l.* 5*s.* per month for so long as she should remain on board; she engaged to act as cook and steward the day after she came on board, and bound herself by an agreement to perform such services; the following day he set sail, and made various voyages from Plymouth to Wales, from Wales to Ireland, from Ireland to Seville in Spain, from Seville to London, and back again to Plymouth, where he discharged the suitor Elizabeth Stephens. Some short time after, the captain took a cargo on board for St. Michael's, and Elizabeth Stephens again entered the ship and agreed for the voyage; shortly, however, the ship was seized by the sheriff for a debt; it was subsequently sold, and bought in by a Mr. Simmonds, the creditor. During this time she remained on board, and the ship was carried into the London docks, where she remained some time on board. The ship was again taken out in September, 1820, for another voyage, when the captain again agreed with the suitor for 2*l.* 5*s.* per month. She remained on board until October, performing the offices of cook and steward, and assisting in her turn in navigating the vessel; she performed her watch and took her turn at the helm. In October the captain became a bankrupt.

The next witness is a custom-house officer:—He went on board the *Jane & Matilda*, in the \* London docks, and [ \* 192 ] there found the suitor on board, bound for Seville in Spain, whom the captain called cook and steward; there was no other person on board, and the master only came occasionally. He considered she was hired by the master, and that she performed her part as a mariner and seaman. The next witness is a waterman:—He says he saw her frequently on board the ship; she appeared to have the sole command; and, in the witness's opinion, was a most excellent shipkeeper, taking great care of the ship. The last witness is a man who went with the ship to Plymouth:—He said she well and truly performed her duty, not only as cook and steward, but as a seaman;

she obeyed all lawful commands ; and he considered her particularly diligent and attentive, performing her part much better than many of the crew had done.

Upon this evidence I find some difficulty in coming to the conclusion that this woman is entitled to nothing. Here are duties performed which must be performed by somebody on board this ship. Nobody else is proved to have performed them. She is proved to have performed them, and to have performed them well. She states her case fairly : produces her witnesses fearlessly ; witnesses not at all connected with her, or otherwise impeached. Nothing comes from them that betrays a disposition to give an unjust testimony. She does not act, as far as I see, with any perverse resistance. She gives up the assignment without any opposition on her part. Here are strong testimonies, totally unopposed, to the work done : and that is

the material point for the court to look to ; for supposing [ \* 193 ] an informality in \* the mode of hiring, still, if the work has been done and properly done, it entitles the performer to the common remuneration ; and it is not pretended that she sues for more than the common rate of payment for such employment. Nobody else is described as performing the duties. It is true, that I rejected an allegation which came too late in the day, which pleaded that the person who seized the ship at Plymouth had been shipkeeper himself, or by deputy, for a certain portion of time ; because it was offered in an undue form, and at an undue period of the cause ; and because the fact, if true, might have been ascertained by fair inquiry long before, and ought to have been so ascertained and regularly produced. The share of the ship transferred to her by assignment of the captain was surrendered without any resistance. I really feel a difficulty in saying, that under all these circumstances the woman is not entitled to recompense. Yet that is what the other parties require. They say she shall have nothing — we bind her to the chance of her legal demand and the decision upon it, and to that only — no compromising offer shall she receive from us.

Now, I cannot blind myself to the facts I have stated of this particular case, though certainly not disposed to encourage any general practice of this kind. Neither can I blind myself to the notorious fact that many offices of man's labor are performed by women in many countries, and amongst other countries, even in our own, and man's labor of the coarsest and roughest species. Even military offices have been so performed meritoriously, and rewarded on that account.

In this court we have seen, during the war, women acting in [ \* 194 ] defence \* of the ships they were on board, and sharing in the distribution of salvage adjudged. We have heard of

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The Jane and Matilda. 1 Hagg.

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women standing by the gun to which their husbands were attached in time of engagement, and of others who have acted as soldiers under the disguise of men, and receiving pay and other emoluments of the profession suited to the proper execution of the duty. The name of Joan of Arc will long live, to her own glory, and to the shame of our country, from which she received such unworthy treatment. I have lately been present at discussions elsewhere, in which many instances have been cited of females holding high offices entitling to military command, and to eminent stations in the field of battle, or for the suppression of civil commotions. The sovereignty of these kingdoms, which entitles the bearer to the character of captain-general of the realm, has been borne by females with sufficient splendor, and, in the case of Queen Elizabeth, not without demonstrations of personal courage, and a readiness to encounter the hostilities with which she was threatened. The Countess of Dorset, Pembroke, and Montgomery, in the time of Charles I., filled the office of hereditary high sheriff of Westmoreland. As such, she was authorized to raise the *posse comitatus*, and she did actually sit on the bench at the assizes, and is even said to have personally attended at the execution of the last process of the law.

Looking to all these circumstances, I find great difficulty in arriving at the conclusion that a female can be entitled to nothing for that service which would be remunerated in a man. It does not appear to me that the sex alone creates a legal and total \*dis- [ \* 195 ] qualification. There may be reasons enough that render the engagement of women in a particular maritime employment unseemly and unsuitable; but if persons have had the benefit of their services in such employments, to the effect of saving the expense they must have incurred by employing other persons in them, I doubt much the propriety of their turning round and taking shelter under the objection that those who have performed the services are not of the right sex.

It was said that the coöwners were ignorant of all this employment of a female. That may be their fault, or their misfortune, in giving their confidence to an unworthy person; but be it one or the other, it would not destroy the legal claim of a third person, who has acquired it. It was said, too, that there was no inattention on the part of the assignees. That may be; but they must take the property in the state in which they find it, deteriorated possibly by the fault of former possessors; but such as it is, such they must take it. And I am constrained to add, that there certainly has been no particular promptitude on the part of these assignees, even after making due allowance for the difficulties that generally obstruct the course of proceeding in



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The King v. Miller. 1 Hagg.

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a bankrupt concern. No defensive allegation was offered till the established practice of the court had shut the door against its admission; and after the cause had been fully heard throughout on both sides, and nothing but the indulgence of the court, acting principally on the hope that a little delay might tend to prevent further expenditure, had postponed the decision, another allegation was offered, with an offer of fresh facts, but without any averment that they [ \* 196 ] \* were such as might not have been discovered, by due diligence, in the proper time, and when no such irregular indulgence was necessary to be applied for. The court rejected the offer on that ground, and leaves, I fear, the property to the ordinary course of bankrupt concerns, to be expended in litigation.

Upon the whole, I am of opinion that nothing has been shown to deprive this female suitor of her right to the ordinary wages for the service she has performed. In her original affidavit she claimed about 60*l.*; in her summary petition, about 90*l.* As I do not wish to distress a bankrupt estate, I shall pronounce for the lower sum. As the present is not a regular court day, I shall not at present make the actual decree; but, having now stated the grounds of my judgment, I shall sign a decree conformably to them on the caveat day.

July 24th. The court pronounced that the sum of 64*l.* 14*s.* was due for wages, and decreed the payment thereof, with the expenses.<sup>1</sup>

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[ \* 197 ] \* THE KING, in his office of admiralty, v. MILLER.

November 17, 1823.

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Illegal colors. Decree of a warrant to be served at Dublin, upon an offence committed in England, the master having absented himself after the institution of the suit.

THIS was a motion for a warrant to arrest the master of the vessel

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<sup>1</sup> The editor is informed that, on the motion of *Mr. Hart*, an injunction has been granted in the Court of Chancery, in this case, on the ground that the master had since acknowledged that the whole was a collusive transaction to defraud the estate, the woman being, as had been stated in the Court of Admiralty, his own wife. The Lord Chancellor thought it was a novel application, but, after some consideration, directed the injunction to issue upon condition of bringing into court the amount of wages, and a small sum to abide the costs.

This injunction does not appear to have been otherwise enforced than by a service upon the proctor. On the 11th November following, a monition was decreed by the Court of Admiralty for the payment of his bill of costs, since which the cause has not proceeded.

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The New Phoenix. 1 Hagg.

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Jamaica, of the port of Whitstable, for a contempt in hoisting, carrying, or wearing illegal colors. The *King's Advocate* stated, that Mr. Littledale, the collector of customs at Whitehaven, observing, on the 2d instant, that this brig was lying in port there with a pendant at her masthead, resembling those usually borne by his Majesty's ships of war, sent the tide-surveyor to Miller, the master of the brig, to inform him that the hoisting such pendant was contrary to law. Miller returned an indecent and insolent message, on receiving which the collector caused the pendant to be seized, and he reported the transaction to the Lords of the Admiralty, who directed the Admiralty Proctor to institute the present proceedings. Since the commencement of this procedure, the brig had proceeded to the port of Dublin; but the offence was not committed within the jurisdiction of the Admiralty court at Dublin, nor does it appear that that court has jurisdiction to proceed on such an offence under the late statute,<sup>1</sup> which imposes a penalty of 500*l.* on persons hoisting on board any British vessel, not in his Majesty's service, any colors used in the royal navy, and authorizes officers of the navy, customs, or excise, to seize such flags.

Warrant decreed.

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\* NEW PHOENIX, Lewthwaite.

[ \* 198 ]

November 25, 1824.

Forfeiture of wages is not incurred by occasional intemperance.<sup>2</sup>

In a suit for wages, a party is not bound to set forth the ill treatment of the master, in his original plea.

THIS was a suit for mariner's wages, brought by Robert Wilson, for the balance of 9*l.* 7*s.* 6*d.*, which he alleged to be due to him for his services on board The New Phoenix, in a voyage from London to Trinidad and back. In reply to the summary petition, the master pleaded the habits of excessive drinking and intoxication of the mariner, which made him totally incapable of performing his duty as steward. In a responsive allegation, the mariner denied the allegations of the master, and set forth that, on all occasions, he conducted

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<sup>1</sup> 3 Geo. IV. c. 110, s. 2.

<sup>2</sup> [The Malta, 2 Hagg. Ad. R. 168; The Dutchess of Kent, 1 W. Rob. 285; The Lady Campbell, 2 Hagg. Ad. R. 5; The Mentor, 4 Mason, 84.]

himself in a sober and orderly manner; and that the master, upon the most trivial occasions, gave way to very violent fits of passion, and frequently struck and cruelly maltreated him.

For the mariner, *Lushington*. A casual act of intoxication, while in port, is not sufficient to deprive a mariner of his wages, though habitual drunkenness will. Two witnesses only, who were examined on the master's allegation, admitted *de bene esse*, support the charge of drunkenness; and we had no opportunity of cross-examining them. It is not in the power of the master, at his option, to displace any one improperly from the situation for which he was hired: and though it is pleaded that he was, during the voyage, discharged from the office of steward, yet it is proved that he still continued to perform the principal duties of it. The charge of intoxication would never have been thought of, if the steward had not threatened the [ \* 199 ] \* master with an action for his repeated cruelty and ill treatment.

*J. Addams, contra*. Drunkenness enures to a total forfeiture of wages; but we do not press for the law to be carried into its fullest effect; the man is already overpaid, as the affidavits state, that, on the voyage home, he only did the work of a common sailor. There was plenty of time for the examination of our witnesses on interrogatory, and charges laid in the responsive allegation should have been stated and pleaded in the first instance, when we could have contradicted them; a party is not justified in laying his case in a summary petition, and then varying it at a late period of the cause; but the charges of ill usage are not proved. If the man had been ill treated, he would have gone to the magistrates at Trinidad, and made his complaint to them.

#### JUDGMENT.

LORD STOWELL. I think this man was quite right to confine himself in the first instance to his statements in the summary petition; he sets forth the capacity in which he was hired, his rate of wages, and that during the voyage which the ship performed, he well and truly performed his duty as steward, and was obedient to all the lawful commands of the master. He now applies to the court for the payment of a trifling balance of the wages; it is a small sum that remains in contest, and the resistance of the master to the payment of it is founded on an imputation of drunkenness in the mariner. The court, however, is not in the habit of paying much attention to minute descriptions of this infirmity, and I do think that the

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The Jonge Nicolaas. 1 Hagg.

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\*drunkenness is very nicely graduated in the present case. [ \* 200 ] The general description given by the witnesses is, that the man was hardly ever incapable of work ; he is not, therefore, stained with being habitually a drunkard. What is stated to have happened while the vessel was at Trinidad, was at Christmas, a time when generally, however improperly, among the lower classes of people, habits of conviviality travel into intemperate excess. But what weighs with me is, that there is an appearance of rigor on the part of the master ; that he is extreme to mark what is done amiss ; and if the evidence be true, he conducted himself in a very violent and passionate manner on the most trivial occasions, and behaved towards this mariner in a way which no misbehavior on his part would justify. It was said, that witnesses could have been produced that would have contradicted the undue severity with which the master is charged ; but I cannot take it upon mere assertion, and the court knows nothing as to what these witnesses would have sworn if they had been produced. I am of opinion that the suit was properly commenced by the summary petition, and that it was not necessary to insert in that, (and it would have been improper,) the charge of cruelty. The case of the mariner is, I think, sufficiently established to entitle him to the balance that remains, and to the expenses of his proceeding in this court ; if I do not give them, I give nothing.

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\* JONGE NICOLAAS, Parma.

[ \* 201 ]

July 12, 1823.

Construction of the terms "salvage and expenses free from duties" under 1 & 2 Geo. IV. c. 75, s. 38; award of magistrates not sustained.

THIS question arises on an application to the court to revise the award of certain magistrates in the county of Sussex, who had ordered goods to be sold free from all duties under the 1 & 2 Geo. IV. c. 75, s. 38,<sup>1</sup> to answer various expenses incidental to the preservation of a wreck, and the ulterior disposal of the cargo.

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<sup>1</sup> "In all cases it shall be lawful for the owner or owners, or if the owner or owners refuse, for the salvors, to sell so much of the property saved as will be sufficient to defray the salvage adjudged, and all expenses attending the same, and such other rea-

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The Jonge Nicolaas. 1 Hagg.

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On behalf of the commissioners of the custom-house, the *King's Advocate* and *Arnold* stated — that this was a Dutch ship which, with a cargo chiefly of wine and brandy, was wrecked off Seaford cliff. On the 28th of January last there was a sum of 1,037*l.* 6*s.* 3*d.* awarded by the justices at Lewes for salvage and expenses; and they directed “a sale, free of duty, of so much of the cargo and stores as would realize the said sum, together with the expenses of the sale,

and such reasonable charges as might be incurred in and [ \* 202 ] about the same;” and, on the 18th of March, the \* sum of

161*l.* 5*s.* 6*d.* was allowed as the further expenses arising from “the removing, cooping, stowing, and sale.” Now besides these articles, there were certain items for which a claim of exemption was made, as on goods sold for salvage, namely, quarantine expenses, protest of the master, harbor dues, warehouse rent, beer for stimulating the coopers, postage, journeys to London and elsewhere, reshipment of cargo, &c., which were allowances that went beyond the policy of the law, and the construction of the act of parliament. This act, the 1 & 2 Geo. IV. c. 75, is now, for the first time, brought directly to the notice of the court; it may be considered as a revival of the 48 Geo. III. c. 130, (continued by the 53 Geo. III. c. 87,) but in s. 38, there is a clause inserted, which is not to be found in that previous act; and upon the due construction of this clause this question principally depends. This section provides, that a sale may be effected of so much of the property saved, as will be sufficient to defray the salvage adjudged, and all expenses attending the same, and such other reasonable charges and expenses respecting the said property as shall be allowed, &c., free from all duties. These additional words must be taken to refer exclusively to the charges incurred upon that portion of the property which may be required for a compensation to the salvors, and cannot fairly be extended to other persons, and other things which may be subject of loss, but not of salvage. The reasoning of the award seems to be, that all contingent expenses consequential to the relief of a case of distress come within the meaning of the law; but there must be some limitation. The words “salvage

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sonable charges and expenses respecting the said property as shall be allowed by the Court of Admiralty, or by justices; and on the production of an order or decree from the High Court of Admiralty, or of an award made by the justices acting in execution of this act, the commissioners of customs and excise shall allow the sale of such goods free from all duties; provided, that in all cases in which they may think it advisable, it shall be lawful for the commissioners of customs and excise to refer such award, which may be produced to them from the justices, to the judgment and revision of the High Court of Admiralty.”

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The *Jonge Nicolaas*. 1 Hagg.

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adjudged" are definite, and show, that \*the exemption con- [\* 203] templated was such as to ensure a sufficiency of remuneration to the salvors; and it was with a view to their benefit, and to their interests only, that this act was passed. The terms "all expenses and other charges" must be restricted to the fair and reasonable expenses directly connected with the adjudication of the salvage, as the necessary law expenses, and those general expenses which are at least antecedent to the storing of the cargo, and to the settlement of the salvage remuneration. All services of such a nature may be admitted with propriety; but it is sufficient to show the interpretation of the magistrates to be erroneous, that, according to their construction, no certain rule or general principle can be laid down for the guidance of the custom-house; each case would vary with its own circumstances, so that the inconvenience is a fundamental objection, particularly when the words of the act are capable of a much more limited, legal, and practical construction. Their objections were confined to the schedules; for they had no intention of disputing the *quantum* of salvage remuneration. They referred to 5 Geo. I. c. 11, s. 13, and also to the exemption under 12 Ann. stat. 2, c. 18, s. 2, for a view of the law with regard to deductions from the revenue, on goods wrecked; and observed, that any discretion as to the remission of duties would be lodged with the lords of the treasury, and not with the government officers.

In support of the award, *Jenner*. The ancient principle of law was to relieve, as much as possible, persons in distress from shipwreck; the words of the act of parliament are large and comprehensive; and are not to be considered as solely for the benefit of salvors, but in support of the ancient \*principle. The expenses [\* 204] were all necessarily incurred by the wreck, and were highly beneficial to the cargo, and to the revenue of the country, by lessening the sale of goods under the provisions of the act of parliament; for whatever tends to increase the value of the goods saved, such as drying and housing the stores, stopping the leaky casks, &c., will diminish the necessary remission of duties, and ought to be entitled to benefit by the act. The owners should not be made liable to the payment of duties on the importation of a cargo which has only been occasioned by distress; they were compelled to this measure by the stranding of the vessel, and by the wreck. If the goods had been destined for this country, the duties might fairly and properly attach; but the legislature never could intend the revenue to benefit by charges, such as quarantine and out-port expenses, arising from unavoidable calamity, when, if there had been no accident, the vessel

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The Jonge Nicolaas. 1 Hagg.

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never could have been subject to them. On this principle, and on the admissions on the other side, and on the expenses of the notary, and other items not being excepted by the commissioners of the customs, he defended the interpretation which the statute had received, and which, moreover, was sanctioned by the practice of the court in the preceding cases of *The Augusta*, Louvel,<sup>1</sup> and the *Johanna Abeg*, Ruyl;<sup>2</sup> where similar expenses had been allowed by the registrar and merchants without any deductions.

*Phillimore*, on the same side, was stopped by the court.

[ \* 205 ]      \* JUDGMENT.

LORD STOWELL. This case must be referred to the registrar and merchants. My own apprehension is, that the act of parliament was solely for the benefit of salvors, and for no others. I have a very strong opinion that they alone are entitled to claim here under the statute. The owners may have met with misfortunes; their ship may have been dashed against the rocks; but as foreigners, they cannot claim the benefit of this act in this court: their sufferings, however much a matter of regret, form no ground for this country to indemnify them. No country in the world gives a salvage of this kind. I can have no doubt upon the words of the statute. The thirty-eighth section provides, that owners or salvors may sell so much of the property saved as will defray the salvage adjudged, free from all duties. What property then is to be sold? — the property necessary for the payment of the salvage: so as to the words “other reasonable charges and expenses that shall be allowed,” — these are to be referred to the expenses directly arising upon the said property, namely, the property sold, such as the law expenses, and the safe custody of that portion of the goods, which may be necessary to be sold to cover the fair salvage disbursements. Supposing there are twenty proprietors of goods on board, and one tenth of the cargo is adjudged for salvage, can it be said that all the expenses of all the proprietors are to be allowed? Here are charges, some of which continue for three months after the salvage service has been effected — how long are they to go on? Some limitation must be affixed.

I regret this question was not brought to the notice of the [ \* 206 ] \* court at an earlier period, in the former cases which have been alluded to. I shall, in this case, reverse the several awards, and refer the consideration of the schedules and accounts to the registrar and merchants.

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<sup>1</sup> *Supra*, p. 21, (n.)

<sup>2</sup> Trinity Term, 1822.

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The *Jonge Nicolaas*. 1 Hagg.

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November 25th. On this day *Jenner* and *Phillimore* were heard in objection to the confirmation of the report. They submitted that the directions of the court did not appear to have been fully understood, for as the report was framed, the parties were in a worse state than before the late act of parliament. The practice had hitherto invariably been to allow the expenses of labor and cartage.

[COURT. That fact does not appear, I know of no such universal practice.]

We admit, that the whole of the cooperage and of the warehouse rent may fairly not be allowed under the statute—that part of the report we do not dispute; but we contend that the whole expense of unloading the cargo, and of the teams that were employed for conveying it to the storehouses, which seemed to be conceded in the former argument, ought to have been allowed; because these were acts which belonged to the salvage of the cargo, and till they were effected the claim to salvage remuneration was not complete. The quarantine expenses, and the payments to the revenue officers, are properly allowed; it was not, however, the province of the registrar and merchants to ascertain the proportion of reward to the principal salvor: on that article, therefore, the reduction must be set aside.

*The King's Advocate* and *Arnold, contra*. The commis- [ \* 207 ] sioners of the custom-house have objected to the introduction of those articles only which are not of the nature of salvage. The court has laid down the principle, in conformity with the act of parliament, upon which the term salvage is to be used; and the registrar and merchants have carried it into execution. The word is stripped of any ambiguity, when it is confined to what is required for the remuneration of the salvors; that is to be sold beneficially for them, namely without the payment of duties. In the reductions that have been made, a proper apportionment has been attended to; and with regard to the services of the salvor, the words in which they are described comprehended other acts which were fairly the subject of reduction.

#### JUDGMENT.

LORD STOWELL. This case has already been once before the court, in order to take its instructions upon the act of parliament<sup>1</sup>; it is a recent act, and made, as I understand, for the benefit of salvors.

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<sup>1</sup> 1 & 2 Geo. IV. c. 75, s. 38.



It often unavoidably happened, that salvors had a disproportionate remuneration: the legislature, therefore, thought it would be a proper attention to their interests, that a portion of the cargo, saved by their exertions, should be sold for their benefit free from duties. It appears that the custom-house officers have been in the habit of allowing a greater quantity of goods to be sold than was sufficient for their salvage expenses; and so far to have benefited their owners beyond the contemplation of the statute. There is no question but that these expenses must be paid, the only question is, [ \* 208 ] \* who is to pay them? Here an act of parliament has been made, allowing a deduction of revenue duties on goods sold to pay salvage; but it could not be the intention of government to charge the revenue with the other expenses that fell upon the cargo. If the misfortune to the cargo had arisen from the fault of government, in neglecting proper precautions on its part, it might have been a fair demand; as, in such a case, the state would be chargeable with a want of due protection to cargoes in distress: but this is a mere accident — a mere wreck by stress of weather, which all are exposed to, who commit their property to the danger of the seas: every man must bear his own misfortune, when the government of a country has done every thing that belongs to it.

The word salvage has been used in a sense that is equivocal: it does not, as it would seem to be contended, extend to all acts of salvage, or services rendered to the cargo; but its statutable meaning is confined, as was properly observed, to the remuneration allotted to salvors, under the name of salvage, for a direct salvage bounty; and in which they have the sole interest, and it does not go beyond that part of the cargo which may be sold for their express benefit. The salvors are, in this instance, the favorites of the court — they are the peculiar objects of the act of parliament — they are the only persons to be indemnified, and whose interests are to be protected. The property saved is to be restored to the owners upon the payment of a reasonable remuneration; but they are not to be indemnified by the government, nor is the government to be charged with unreasonable demands for their advantage.

[ \* 209 ] \* After the best attention paid by the court to the arguments that have been addressed to it, I see no reason to alter or revise my former opinion. The registrar and merchants appear to me to have taken a full and fair estimate of what was the decision of the court. It may be a question of some difficulty, where no actual sale has ascertained the general value, as to what portion of the cargo should be selected for sale free of duty; and the custom-house officers must form their estimate as correctly and discreetly as

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La Lune. 1 Hagg.

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they can : the cargo may belong to different owners ; and those whose portions are not touched must make some measure of compensation, that the whole may derive a common benefit. It may be regarded as not unlike a case of *jactus*, where there is a contribution for the portion of goods sacrificed for the preservation of the remainder.

It is, I think, quite a mistake to call the expenses that have been disallowed, expenses of salvage — expenses of salvage, I repeat, in the sense of the statute, are those necessarily incurred in the payment of the salvors. The registrar and merchants have properly given only such a proportion of the whole expenses as the sum allowed to the salvors bore to the value of the whole cargo — what is to go to them, is to enjoy the privileges of the statute — that is my idea and impression of the intention of the legislature, while that part of the cargo which is to be sold for the payment of other charges is not to have the same benefit. It was said that the registrar and merchants had no right to interfere with the remuneration of Mr. Stone, the prominent salvor ; but, I think, the answer is satisfactory ; and that the magistrates clearly remunerated him (no doubt an able person) not only for services of a salvage nature, but for other services which the report was fully authorized to disturb. Upon these grounds the court overrules the objections, and confirms the report. I think the custom-house officers have done a meritorious act in bringing this case to the notice of the court.

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## PRIZE COURT.

LA LUNE.

November 25, 1823.

Head-money refused, there being no proof of an effective exchange of prisoners.

THIS was a motion for head-money on the capture of a French privateer, *La Lune*, with a crew of 47 men, who were landed at the city of St. Domingo in 1806. The privateer was sent to Jamaica, where she was sold. The capturing vessel was *The Morne Fortune*, commanded by Lieutenant Rorie, with a crew of only 50 men.

It had been moved on a former day, but the court thought head-money was not payable on men landed not for a regular exchange of prisoners, and no receipt for them was produced.

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The Frederick. 1 Hagg.

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A new affidavit was now read, stating that the 47 men had been landed with a view to exchange; that a promise was then given by the French commandant to deliver an equal number of British prisoners should any arrive; and that it was the custom at that time in the West Indies, upon captures by vessels proceeding on a cruise, to land the \*prisoners unconditionally, if an exchange was not practicable, at the nearest port.

The court asked what was the proof of the delivery of the prisoners for an exchange having been authorized by the admiral, beyond the affidavit of the officer claiming the head-money?

The *King's Advocate* replied, that the confirmation arose from the *res gesta*, the entries in the muster-books and log. All other documents were lost.

July 13th, 1824. The matter stood over for a search into precedents. The motion for head-money was ultimately rejected, on the ground that there was no proof of an effective exchange.

On the same day an application for head-money for five *capuchin friars* (passengers) was refused.

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### FREDERICK, Hearn.

December 4, 1823.

Mariner's wages; a refusal, on the part of the master, to certify for the wages of his crew upon their quitting the ship, especially when coupled with equivocal expressions as to leave, is no decisive proof of a desertion.

A party who does not accept a tender is not entitled to his expenses in case of a litigation, when he might have had the same sum without it. The justice of a demand is not always to be measured by an offer.

A wrongful discharge enures to a reimbursement of necessary expenses.

Effect of wages earned on board another vessel not making the same homeward voyage as the one for which the engagement had been made.

Condemnation of a proctor in the costs created by the introduction of irrelevant matter, owing to his own unfair representation.

### JUDGMENT.

LORD STOWELL. This was a suit for wages brought by Hugh Beard and Robert Waters, who allege that they were hired as mariners in March, 1822, to proceed on a voyage from London to Ja-

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The Frederick. 1 Hagg.

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maica, and back again to the port of London, at 2*l.* 5*s.* per month; that they arrived at Jamaica on the 15th of May following, and were discharged on the 25th, without their consent, and without payment of wages; that they were obliged to sell their clothes for subsistence and travelling \* expenses across the island, to [ \* 212 ] seek other ships whereby they might return to England; and, finally, that they well performed their duty. The whole charge made by one of them, including the value of the clothes, is 8*l.* 1*s.* 6*d.*; that of the other is 8*l.* 18*s.* 6*d.* Such is the substance of their summary petition.

The owners have given a defensive allegation, stating that these two men, with five others, got intoxicated on the 25th with rum clandestinely procured; that they quarrelled with the steward, demanding more rum, and afterwards with the mate for the same reason; that on the captain's return from the shore they made the same demand from him, and in the same violent and turbulent manner; that he seeing them intoxicated, refused, and ordered them to go to bed. One Brown, it seems, was the ringleader; this man is no party to the present suit, but he was extraordinarily violent. The captain said if he was dissatisfied he might go on shore, which Brown declared he would do. The others then said, if one went all would go; and the captain ordered the second mate to go in the boat with them; but it is alleged that he did not in any manner discharge these men; and their conduct is represented as an act of mutiny and desertion.

The whole controversy between the parties themselves turns upon this single question, whether the seamen deserted or quitted the ship with the consent and allowance of the master; or whether they had leave from him to quit the service of the ship? In which case it would be no desertion, and still less so, if they received any order to quit without having made such order necessary by any misconduct \* of their own. Before I examine the facts it is not [ \* 213 ] unimportant to observe, that desertion is an offence extremely prevalent upon these West India voyages, and has been so recognized by acts of parliament denouncing peculiar penalties against it, as requiring stronger checks to prevent it than are deemed necessary in any other course of navigation. The desertions usually take place in the West Indies, and are provoked by the much larger wages that are held out for the return voyage than could be obtained for the whole voyage outwards and home, in a bargain concluded in England, where seamen are numerous, and of course to be had on comparatively cheap terms. In the West Indies European seamen are not to be had, but under the accidents of a compelled discharge

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The Frederick. 1 Hagg.

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or a desertion. From that circumstance, and from the obligation of greater attention to the more valuable return cargo, the value of an European seaman rises higher in the West Indies, and of course furnishes a temptation which the legislature has found it necessary to meet by the imposition of strong penalties.

The summary petition enters but little into the particulars that led to their withdrawing from the service of the ship. It states generally their good conduct and obedience to all the lawful commands of the master; but the depositions of the two witnesses enter largely into the history of the dismissal; for a dismissal, or rather something like a dismissal there certainly was. Their account is, that on Saturday night, after the conclusion of their work for the day and for the week,

• they desired to have a Saturday night's bottle of rum, which [ \* 214 ] \* was refused by the steward and mate, the captain being then on shore. This bottle, it seems, is not an unusual indulgence on board West India ships lying at those islands, but it had not been the practice of all captains to allow it, and had not been the practice of this captain in particular; and upon that ground, and upon the mate's observing that they already had taken as much rum as was proper for them, (where they got it he could not say,) he declined to comply with their request. This produced much dissatisfaction, and no inconsiderable quantity of abuse upon him, particularly from one person, Brown, an Irish mariner, who appears to have thought it the peculiar privilege of his country to take the lead upon such an occasion, and to show, as he expressed it, "that he had an Irish heart and Irish blood in his body." Things continued in this perturbed state till the captain returned from the shore, and they did not abate then; for the men addressed their demand of this bottle to him, and certainly in no very measured language upon his refusal; for Brown transferred his abuse to him in gross terms, and words of defiance and challenge, to which the court might without impropriety apply the term of mutiny. This man does not sue for his wages, and that is, I think, a strong admission that he was sufficiently apprised of his own misconduct and of its necessary consequences, the forfeiture of his wages. Beard is charged by the mate as his second in these acts, and if so, is less modest, for he ventures forward as a suitor in the present cause. The captain, on his examination, says, he told Brown, that if he was dissatisfied with the ship he [ \* 215 ] had better \* leave her; upon which the other replied he would be d——d if he did not, and Beard or Brown replied, (he does not remember which,) that "if one went all would go." According to the captain, this was the single expression of the one or the other of these two men, but he expressly says that he does not

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The Frederick. 1 Hagg.

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remember that either Beard or any other of the men joined in Brown's abuse, or said any thing disrespectful to him. I do not find that the captain received the information from any of the other men, or that he addressed any question pointing to any such resolution taken on their part. There is a contrariety of evidence on this important part of the case. A good deal of it represents him as saying, "if one goes all shall go," and other expressions of the same import, which certainly indicate, on his part, that they were all unanimous; as I take for granted they were at least unanimous upon this favored subject of the Saturday night's bottle; for there was no dissentient voice *quoad hoc*; but whether this making a common cause was inferred from their standing by Brown when these conversations passed, and hearing this declaration of his without contradicting it, does certainly not appear from this evidence. The captain, however, acted upon it, and appears to have acted sincerely, though it may perhaps be thought, that if he had acted with less passion, he might have acted with a less inconvenient result.

Upon this evidence, I think, it clearly appears that these men have behaved very ill. Their giving countenance to the mutineer Brown, their refusing to put out their lights, and to go below to bed, when so ordered by the captain, their \* adhering to Brown [ \* 216 ] in his determination to leave the ship, (if this is to be considered as solely their own act,) forms altogether a case of gross misconduct, inducing forfeiture of their wages. But upon this evidence it may be questioned whether this last act is to be considered as exclusively their own; whether some expressions and acts are not attributable to the captain, which lower the criminal character of the act on their part. The captain admits that he was much irritated at Brown's abuse; and one cannot wonder at it, or charge it at all as an indication of very unreasonable intemperance of mind. But it must be remembered that in all acts of discipline and authority passion is a bad counsellor; and that on such occasions care is to be taken to suppress even natural and honest feelings of resentment, which may have the effect of transferring a share of the blame belonging to the transaction to the other side of the question. Now, without meaning to impute any thing to this captain, I am bound to notice that he admits he was so irritated that he cannot depend exactly upon his memory of what passed; that the principal mate, a witness of great credit, goes no further than to say, that the captain did not formally discharge them; leading, by the use of this word formally, to a conjecture that there might still be something said, which these men, with a willingness of interpretation on their side, might construe into an actual liberty to depart—a *liceat migrare*.

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The Frederick. 1 Hagg.

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And if his words were such as might be so misunderstood, it would be a little hard, I think, to stamp that misinterpretation with the guilt of absolute mutiny and desertion.

[ \* 217 ] I do not observe that the captain addresses any \* caution or remonstrance to the men. They were flushed with liquor, it is true ; but with the exception of Brown, had not, perhaps, arrived at a state in which they were incapable of hearing reason addressed to them in the mollifying language of expostulation. They are furnished with a vessel to convey them to the shore, with their clothes and their hammocks. The captain, probably, did expect their return the next morning, but that was not made known to them, nor could they well conceive it in the circumstances under which they parted. He had sent a message to the wharfinger, at the place where they were to land, to detain their clothes, but this was wholly unknown to them ; and no application was made to any civil authority to reclaim them, nor any attempt made to recover them by any other means to which resort could be had.

Now, if my duty compels me to examine the evidence minutely, I think I should not discharge that duty if I totally overlooked this part of the evidence as wholly insignificant. Here are expressions not only permissive, but imperative, that they should all go, and that their clothes should be put aboard the boat without loss of time. I find a difficulty in saying that all these circumstances do not produce some proper hesitation in holding this to be a clear and decided case of desertion. It is true, he refuses at the time to certify for their wages. That is a mere present suspension, founded, possibly, on the expectation of their return the next morning, but it is not definitive upon the nature of the transaction.

I think, however, I am relieved from the necessity of deciding on its nature, (left, as it is, in a state \* somewhat equivocal,) by what has since taken place. The captain, on the part of the owners, had agreed to pay the wages up, not only to the 25th of May, but to the 5th of June, when they were able to procure a ship on a return voyage to Europe. The sum to be paid, after deducting what is claimed for clothes, is very trifling, and must be pronounced for without costs, for so it was tendered ; and if the party does not accept what is so tendered to prevent litigation, such party shall not be entitled to the expense of that litigation, when he might have had the same sum without any litigation at all.<sup>1</sup> Nothing can be clearer than that this offer of the owners was no admission of the

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<sup>1</sup> *Supra*, p. 156.

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The Frederick. 1 Hagg.

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justice of the demand, but merely an offer in order to escape the inconvenience of a litigation with an insolvent party. From such parties nothing could be recovered, with all the justice in the world, established to the most entire satisfaction of the court. It is objected that he refused payment for the clothes which they carried with them, and which they were obliged to dispose of to pay their travelling charges in crossing the island, to find a ship at Kingston for a return voyage to England; for it appears that, after landing at what is called the Wharfs, they traversed the island for that purpose, in which they were successful after expending in their journey the value of the clothes which they brought with them from their ship, The Frederick. And certainly, if they had been wrongfully discharged, and had received no compensation, the court would have \* held [ \* 219 ] them clearly entitled to reimbursement for these necessary expenditures. But the court has already pronounced, that upon this evidence it is not entitled to say they were wrongfully discharged; and, therefore, a decision upon that point, if not indispensably necessary, is certainly not advisable. In the next place, it is to be remembered that they have received an ample compensation in the increased wages of the return voyage, when they had 5*l.* per month, instead of 2*l.* 10*s.* That, I think, is a sufficient set-off against the old trowsers and jackets, and other paraphernalia, which probably might be in rather a fatigued state from the use which they had already undergone. I shall content myself, therefore, by allowing barely the sum tendered, without costs, and without allowance on that particular account.

Here, I think, ends the controversy between the parties. There remains another between the proctors; for it is upon transactions entirely passing between them and their clerks, and with little intervention of the parties themselves, except under their immediate direction, that this further demand remains to be considered. The proctor for the mariners gave an allegation, pleading direct admissions on the part of the captain's proctor, that the demand of the mariners was just. That allegation, in the terms in which it was expressed, did not at all convey to the court any suspicion whatever that this passed in a preliminary confidential conversation between the proctor of the mariners and a clerk, who appears to be an experienced and intelligent person, of the proctor for the owners, about settling the demand without \* the prosecution of a suit. I adhere to the [ \* 220 ] opinion I have expressed, that where an intercourse for such a purpose as the definitive settlement of a claim is to take place, it is most effectually conducted by the proctors themselves. They have both a personal and legal weight, and an authority that can better



support them against overweening pretensions; and there is a direct responsibility belonging to them, highly proper to intervene in any point so extremely important as the purposed final adjustment of a cause. The court, having admitted the allegation in the form in which it appeared, pleading an acknowledgment of the justice of the demand, was under the necessity of admitting a responsive allegation, in which a number of witnesses are necessarily introduced, in order to undeceive the court and vindicate the proctor. A very different character was assigned to this intercourse, a character which represents the submission to the demand to be, not a submission to its justice, but a mere sacrifice to convenience, in which a party, before the institution of a suit, is willing to recede from a certain portion of his own just right for the comfort of avoiding what cannot be considered as a luxury in any court whatever, the trouble of a suit; and particularly of a suit in which success itself is barren and unproductive, inasmuch as costs, if given by the court to the owners, are irrecoverable against such opponents as common mariners.<sup>1</sup>

[ \* 221 ] \* This circumstance makes these preliminary negotiations of eminent use in these causes, and entitled to the peculiar protection and support of the court, which is sacredly bound to the duty of considering the true intent and meaning of the parties, and of guarding against the abuse upon converting the terms of mere proposed accommodation into an acknowledgment of absolute injustice. That is a gross perversion of a very useful practice; and, instead of nipping suits in the bud, can only make them branch out into a new inordinate extent of litigation. It has so done in the present case; for it has created the necessity of a responsive allegation, and of many witnesses to be examined upon this question, depending between the proctors, on the meaning of their conversation. I have no doubt upon its real meaning, that it has been a proposal to recede from strict rights as considered by the party, in order to prevent a suit, which it is now employed to swell to an enormous extent. The conversation is held at a time that proves its purpose. It is held before the institution of the suit. It never could be the purpose of a party who went there looking to a suit, to go and make admissions that would be fatal to his client in that suit. It could

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<sup>1</sup> For the mariners, *Lushington* had argued that the second allegation was only introduced with a view to rebut the charge of mutiny and desertion, which was effectually done by the existence of an offer from the owners of a part payment of wages, inasmuch as no offer would have been made if no wages had been due. *Jenner* and *J. Addams*, *contra*, observed that the words adopted in the negotiation were "consented to pay," not "admitted to be due."

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The Frederick. 1 Hagg.

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only be to prevent it, not to admit without reserve what he is afterwards to controvert by plea and proof. There is no absolute necessity to state this to be without prejudice; the *res gesta* speaks for itself, even without the mass of evidence that is here adduced to \* prove it. The attempt to give it another charac- [ \* 222 ] ter is a *mala fides*, a gross misapplication, and violation of that salutary confidence which is the vital principle of such conversations. And this leads to still more hostility; for the proctor has to defend himself against this imputation of unworthy conduct, and the court has to protect itself against the effect of the misrepresentation.

I have already taken occasion to observe that, in this class of cases, brought forward as they are by men wholly illiterate, of no very distinct powers of apprehension, and often of no very restrained principles in the statement of their claims, and in almost all cases totally out of the reach of costs and damages for the most exaggerated demands, the proctor has something of a public as well as a private duty thrown upon him, something that in such cases he owes to the fair administration of justice, as well as to the private interests of his employers. The interests propounded for them ought, in his apprehension, to be just, or at least doubtful; for I do not say that he is not justified in submitting to the decision of a court a doubt which it is not his province to decide. When such interests are propounded, they are not to be pursued *per fas et nefas*; but they are so pursued if endeavors are used to stifle the fair and true circumstances of the case, and knowingly to impose a false case, that is, to make himself an instrument and a party in the fraud.

It has been observed, that the return voyage is the golden harvest of these mariners, so employed. If picked up in the West Indies, their wages are double of what mariners, engaged for the whole voyage, out and home, would receive for the return part of it.

\* In this case it is proved that they entered on board the [ \* 223 ] ship *Antelope* at Kingston, and received an increase of wages in her service, so as in fact to be benefited by their removal from their former ship. The demand made, however, is for wages against *The Frederick* up to the time of her own return home, as if they had been actually employed in her service during the months that they were so much more beneficially employed in this other ship. This could hardly be a secret to the proctor. It had been communicated to his clerk Thompson, who it is to be supposed must have imparted it to his master. His master must have made an inquiry so obvious and necessary. The men did not come home in *The Frederick*; they must have come, therefore, by some other ship; and it was necessary to know in what capacity, whether as mere passengers, or

as mariners earning wages, and increased wages, which, of course, might extinguish the whole, or at least part, of their demand against the Frederick. It was the proctor's duty to ascertain this fact; but not so; he attempts to stifle the evidence, and to shut out all knowledge of the fact by directing the men not to answer the question by what ship they came home, and telling them they would commit themselves if they did. How commit themselves? By telling the truth, and preventing a gross act of extortion and injustice? I do not say that a practiser, or his party, is bound to find evidence for his opponent in a lawsuit. But where a meeting is held for amicable arrangement, and the parties are personally produced for the purpose of fair agreement, and to prevent litigation, it is contrary to the purpose of such a meeting to resist a fair disclosure of all facts [ \* 224 ] leading to a just conclusion, \* and to suppress facts without a knowledge of which real justice is unattainable. Men ought not to come to such a meeting as to a catching bargain, but in a spirit of equitable adjustment. No particle of that spirit is discernible in the same quarter in the further progress of the business.

It appears that the owners were able to ascertain otherwise; that the crew came home in the ship Antelope, which had arrived at Liverpool, and that they came, not as passengers begging their conveyance, but as mariners receiving wages. At that meeting they were asked what they had so received? The answer was 50s. Are you willing to swear it? Quite ready and determined. I do not observe that any check was opposed to this by the proctor, who must have known the fact that this was a fraudulent falsehood, for his clerk was apprised of it; and if known to him it could not be unknown to his master; and yet without any opposition on his part, a gross perjury would have crowned a gross fraud. Application was made for a week's respite to write to Liverpool to receive an answer upon that point, which was refused, although grantable without the slightest danger; and an action without any regard to that reasonable and just request was entered, although the ship had just arrived, and was immured in the West India Docks, her cargo not delivered, and she in a total incapacity to give them the slip. All this savors of a sharp and hungry practice, tending to defeat justice by the pressure of useless inconvenience and vexation, contributing not so much to the protection of the mariner's interest as to the practitioner's own profit.

[ \* 225 ] These are not the only objectionable parts in \* the conduct of this business; others have been pointed out and commented upon with great force by the counsel for the owners. Adopting several of their views, I do not feel it necessary to pursue

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The Elizabeth. 1 Hagg.

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that course minutely, because I do not feel it necessary to do so in order to enable me to determine what is to become of the costs created by the introduction of so much matter foreign to the real and natural merits of the case as between the parties. Upon either of the parties, I think, I cannot throw the costs of what is rather to be considered as a battle between the practisers. Upon which of them are they to fall? I think upon the practiser who has introduced an uncandid representation, that has created the necessity of all that has followed in contradiction. I may perhaps be thought to deal too temperately in not going further; but I content myself with giving that admonition which will be conveyed by condemning this proctor in all the costs occasioned by the giving of the allegation.

The court decreed that the seamen were entitled to their wages according to the tender, and condemned the proctor for the promoters in all such costs as were occasioned to the opposite party by the allegation dated January 10th, 1823.

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\* ELIZABETH, Lisboa.

[ \* 226 ]

January 21, 1824.

An appeal from the Vice-Admiralty Court at the Cape of Good Hope, on the cognizance of a charter-party, deserted.

THIS was an application for a decree of desertion of appeal. The motion was unopposed.

It appeared, that in a charter-party made at the Cape of Good Hope, some merchants of that place agreed to insure to the owner of the vessel 7,000 rix-dollars, "against all such risks as underwriters run:" — whilst the schooner was thus employed, she was wrecked; and the owner instituted proceedings in the Vice-Admiralty Court at the Cape, and on 29th April, 1822, a monition issued against the charterers for the payment of the above sum into the registry. It was personally served on one of the parties, and, on 20th May, an appearance was given to the action under protest to the jurisdiction of the court. This was met by a recital of the terms of the patent of the judge,<sup>1</sup> whereby he is empowered to take the cognizance of

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<sup>1</sup> See the observations in the judgment of The Apollo, Tennant, *infra*, p. 313.

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The Neptune. 1 Hagg.

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charter-parties. And on the 22d July the protest was overruled with costs. On 5th August, the money and the interest due from the issuing of the monition were decreed to abide the order of the court, and on the 14th, the charterers brought in the money, "and prayed leave to appeal to the High Court of Admiralty." The money was subsequently paid out, on bail being given to answer the appeal.<sup>1</sup> The appeal not being duly prosecuted, *Adams* now moved the court to pronounce the appeal to be deserted, and to condemn the appellants in costs. Motion granted.

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[ \* 227 ]

\* NEPTUNE, Clark.

February 17, 1824.

Where part of a vessel had been saved by the exertions of the mariners ; held, that they were entitled to the payment of their wages, as far as the fragments of the materials would form a fund, though there was no freight earned by the owners.<sup>2</sup>

THIS case came on upon the summary petition of George Rounds, a seaman, claiming wages due to him from the master and sole owner of *The Neptune*. The petition alleged, that in February, 1823, the ship being then in the port of London, designed on a voyage to Rio de Janeiro, Hamburg, and London, Rounds was hired as a seaman by the master for such voyage, at 2*l.* 5*s.* per month, and entered on board her accordingly. On the 17th of February, 1823, he signed the usual ship's articles, and shortly afterwards *The Neptune* sailed with her cargo to Rio de Janeiro, where she safely arrived in June, and discharged the same, thereby earning freight to a considerable amount. On the 4th of July she discharged the last package or part of her cargo. She then took on board a cargo for Hamburg, and proceeded on her voyage ; but in October was driven by a gale of wind upon the French coast, and there stranded, so that only a part of the ship, and no part of the cargo, could be saved. That Rounds and the other mariners exerted themselves very laboriously in saving the masts, spars, rigging, some of the sails, the anchors and cables, and

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<sup>1</sup> See *The Woodbridge*, p. 76.

<sup>2</sup> [See *The Reliance*, 2 W. Rob. 119 ; *The Dawn*, 1 Daveis, R. 121 ; *Abb. on Ship.* (6th Am. Ed.) 632, note.]

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The Neptune. 1 Hagg.

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a considerable part of the hull, which were afterwards sold for much more than the wages of all the mariners who had sailed from Rio de Janeiro to the 6th of November, when Rounds and the other mariners were discharged by the master. And the petition contained the usual averments, that Rounds, while in the service of the ship, well \* and truly performed his duty. The balance of [ \* 228 ] wages claimed by the petition amounted to 8*l.* 3*s.*

For the owner, *Arnold* objected to the admission of the summary petition in the form in which it was laid. The wages earned for the outward voyage have been paid; but the wages of the return voyage perished with the ship. If the cargo had been saved, so as to earn freight, then the rule of law, "that freight is the mother of wages," would have applied, and wages would have been due in proportion. A principle of encouragement to the sailor furnishes another rule—that if the vessel be not preserved, the wages are lost. Molloy, the oldest book to which reference is usually made in these cases, says, "In a suit for mariner's wages it was agreed, that if the ship do not return, but perishes by tempest, &c., the mariners shall lose their wages; for if the mariners shall have their wages, they will not use their best endeavors, nor hazard their lives to preserve the ship," p. 245, citing 1 Siderfin, 179. This rule has never been impugned in the courts of this country,—there is no statute, nor any particular decision to the contrary, and foreign codes vary materially upon the subject. The owners do not deny that the men remained by the vessel till she was lost, doing their duty, and preserved a part of the wreck, and they admit that they are entitled to a compensation for these services, but of a different kind from the payment of wages, as something of a salvage remuneration, or on a *quantum meruit*. I am aware that to this reasoning, language of this nature may be urged; that wages are a consideration of a very sacred kind, that they are almost imprescriptible; but such language applies only \* to a case where the right to wages has fully accrued. [ \* 229 ]

*Adams, contra.* It is admitted that wages were due to Rio de Janeiro, and that the men are entitled to a compensation for their exertions: the vital position is, that a loss of wages arises from a loss of the ship. The general *dictum* upon which this argument is founded, like other general *dicta*, may be generally true, but it is not universally maintainable: there are many cases of exception. Suppose a ship going out upon a voyage of speculation, in search of freight, and she returns home empty, no one can maintain that no wages would be acquired. Again, in a case of barratry on the part of the masters or of the owners, they could not set up their own mis-

conduct as against the favored claimants of the law. Suppose a ship overtaken by a violent storm, and goods are thrown overboard, but the ship returns in safety, no freight in such a case would be earned, but the owners could not deny the claim for wages. Here there was one entire subsisting contract, from London to Rio de Janeiro, and then to Hamburg, and back to London. Why were wages due up to Rio de Janeiro? On account of the contract. When was that put an end to? I contend that as long as the materials existed, to which the contract attached, it cannot be said to be extinguished, or on what ground could the owners undertake to sell these materials, unless as subject to the contract, which overrides all parts of the ship? The men continued to employ themselves as sailors in the service of the ship, and they could not have been justified in refusing [ \*230 ] to obey the lawful authority and orders of the \* captain. It is allowed that a compensation should be made, but who is to be the arbitrator? No one has hitherto been bold enough to bring sailors forward for a salvage on their own ship. The duty of saving the ship implies a duty of the owners to pay the wages. Mariners cannot insure their wages, and on this principle, that nothing should remove an inducement, on their part, to exertion, in the hour of danger. With respect to the authorities cited, Molloy uses the words, "if the ship perisheth;" Siderfin says, "if the ship is lost," thus referring to a total loss, and here neither one nor the other applies. But Abbott, in his treatise on the law of merchant ships and seamen, p. 435, 3d edition, contains all the law that can be collected together upon the subject; and it appears that some foreign ordinances, in cases of this description, give a proportion of wages, and some do not. There is, therefore, neither authority nor principle to oppose to this claim.

In reply to the hypothetical cases, *Arnold* observed, that the first must be a matter of special contract: as to the second, freight might have been earned, and would have been, if there had been no misconduct of the owners, or of those employed by them; this could not work an injury to innocent parties; and in the ejection of goods in a storm, freight would be earned on a claim upon underwriters for an average loss.

#### JUDGMENT.

LORD STOWELL. This case comes before the court upon the summary petition of George Rounds, a seaman, who claims wages to be due to him upon the facts there set forth. The [ \*231 ] \*admissibility of this petition is not contested upon any contradiction of fact, and indeed it could not be in the

present stage, for the petition must be taken to be true in its statements of facts, for the purpose of considering its admissibility, unless it involves some stringent contradiction in its own representation of them. I understand, however, that the truth of the facts represented would not be denied, even if in this stage of the proceedings there was any place for any such opposition. The parties agree to take the judgment of the court, assuming the facts stated as not to be denied, upon this question of law, whether, in this admitted state, the conclusion follows in point of law,—that mariners are entitled to wages out of the remains of a ship so preserved.

That they are not so entitled is, I think, contended principally (I had almost said exclusively) upon the ground of a maxim well known in our maritime law (indeed much more familiarly there than in any other system,) that freight is the mother of wages. The case in *Siderfin*,<sup>1</sup> quoted in argument, relates to a total loss and perishment of the vessel, in which no part is saved; and the *dictum* in *Molloy*<sup>2</sup> founded upon it, (he himself not being a writer usually placed in the first class of authority upon such subjects,) lie both out the sphere of any just application to the present question. The maxim itself, a peculiar favorite of English maritime law, is, I think, to be taken upon the argument as the sole ground of a solid opposition to the claim of the mariners, if it be entitled to be so \* considered. For no freight was earned, and there was a [ \* 232 ] forfeiture of freight, and therefore of wages, if this maxim governs this case.

The maxim, though generally received, like most other maxims delivered in figurative terms, certainly is not formed with real and strict accuracy. For the natural and legal parents of wages are the mariner's contract, and the performance of the service covenanted therein; they in fact generate the title to wages. The rule that makes the payment of wages dependent on the earning of freight is an additional security to the safety of ship and cargo; and, as the Lord Chief Justice Abbott expresses it in his excellent publication,<sup>3</sup> was framed in order to stimulate the zeal and attention of this class of persons engaged in very perilous service. The payment of wages is made by the policy of maritime states to depend on the successful termination of the voyage, entitling the owner to his freight, though in other commercial contracts, the workmen are entitled to their stipulated wages, though a losing concern does not supply a fund to the merchant adventurer himself for the payment.

<sup>1</sup> P. 179.<sup>2</sup> P. 245, ed. 1707.<sup>3</sup> P. 485, 3d ed.



At the same time, although the rule so introduced prevails generally, it by no means follows universally, *è converso*, that where no freight is due, no wages are due also. Mr. Jacobsen, in his laborious and comprehensive work,<sup>1</sup> says, — “It is a general rule, that freight is the mother of wages; but to this there are several exceptions;” and he enumerates some of them<sup>2</sup> — there are others that are [ \* 233 ] not so enumerated; as the cases of ships going \* out in pursuit of a freight and returning disappointed without a cargo, in which case it can never be said that the seamen are not entitled to their wages both on the outward and on the return voyage, though no freight whatever was earned. A rule so evidently bending to reasonable exceptions, can never be considered as universally conclusive in the absence of all other confirmation, arising either from the institutions of nations, or from the decisions of their tribunals, and standing in opposition to reasonable principles of law and jurisprudence, and to public utility and convenience.

The practice, at least the modern practice of great maritime states, shows a repugnance to the application of this particular rule, of total forfeiture of wages where parts and fragments of the vessel are preserved that can be applied to a total or partial satisfaction of them. The French, a great maritime state, enjoin expressly in their celebrated ordinances of Louis the Fourteenth, that they shall be so applied. By the ordinances of Spain of 1563, when that country was at its zenith of maritime glory, the same practice was enjoined. In Holland, a country the most exclusively maritime, the ordinances of Rotterdam prescribe it. Such is likewise the rule of the Danish code, as may appear from Mr. Jacobsen, that if any part of the vessel is saved, the crew are to be paid out of the materials of the wreck which they have saved. So in the North American States, as I understand, *ex relatione* of a gentleman high in judicial station in one of the states, that he had never found any decision direct upon that point, but that such was the received understanding of the settled practice of that country (which has turned its atten- [ \* 234 ] tion \* successfully to questions of maritime law); and that understanding is there fortified by the general notion of its being the settled practice of their parent state, though they had not found such a written rule in our books, any more than in their own.<sup>3</sup>

<sup>1</sup> On Sea-laws.

<sup>2</sup> “As where the voyage is lost by the fault of the owners, as if the ship be seized for their debt, or on account of having contraband goods.” p. 153.

<sup>3</sup> The attention of the American courts seems to have been directed to this subject in more than one instance. The case of *Frothingham v. Prince*, (3 Mass. Rep. 563,)

Chief Justice Abbott, in his book, admits that he had met with no decision upon the question in any English reports, and Mr. Bell, in his learned commentary on the Laws of Scotland,<sup>1</sup> remarks a similar absence of any recorded judgment in the reports of that country. However, it may safely be asserted, upon the enumeration already produced, that much the greater part of the eminent maritime states have adopted this rule.

Now, such being the fact, I think I do not go too far in saying that it founds something of a presumption that, if nothing appears to the contrary in English statutes or English decisions, this great maritime state to which we belong is not more indifferent to the merits of its own seamen, — men who can certainly come into successful competition with that class of persons belonging to any [ \*235 ] other community. I take it without hesitation upon the authority of the Lord Chief Justice, that no adjudged cases are to be found in the reports of our courts of general jurisdiction. This may arise from one of two causes — either that the law was so generally understood one way or the other, that it did not admit of controversy (for it is controversy that leads to decision); or that if there have been decisions upon the point, they have, like many other decisions upon many other points, escaped the attention of former reporters. It is but a late practice in this court to have its reports published;<sup>2</sup> the manuscript collections are but few, and I find no notice of any adjudication upon this matter in those which have fallen into my hands. Nor do I find any rule prescribed by any ordinance of the legislature. This dearth of any direct domestic authority of any species upon the subject, drives us necessarily to the consideration of what is the most reasonable rule in principle, and the most useful and

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decided, that the payment of wages did not depend upon the earning of freight, if the ship or any of her materials, equal to the wages, remained after the voyage. But this decision is regarded by Mr. Justice Story, as a single case, standing alone against the current of authority (*The Saratoga*, 2 Gallison, 183); and he accordingly approves of those cases in which the wages are adopted "as a mode of ascertaining and fixing the salvage. The wages recovered in cases of shipwreck, are recovered in the nature of salvage, and as such form a lien on the property saved." *Phillipps on Insurance*, p. 463. (Boston, 1823.)

<sup>1</sup> Vol. i. p. 504. Mr. Bell has recently been appointed Professor of Scotch law in the University of Edinburgh.

<sup>2</sup> It is almost superfluous to observe, that the public is indebted to the labors of the present King's Advocate, Sir Christopher Robinson, for the establishment of the Admiralty Reports in 1798, — "a publication calculated to prove to the world that Great Britain administers the public law of nations with the same distinguished ability and unblemished purity, which have so long been the glory of her courts of municipal judicature." Lord Grenville's speech on the Russian convention of 1801, p. 28, (n.)

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The Neptune. 1 Hagg.

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beneficial in practice ; aided as it may be by the prevailing practice of other maritime states, adopting into their positive institutions rules derived from their ancient usage upon the subject, or from a more recent and correct consideration of it.\* Taking, as far as may be proper, the benefit of that collateral authority, I am of [ \* 236 ] opinion, that private justice and public utility \* range themselves decisively on that side of the question which sustains the claim of the mariner.

What is the obligation which a mariner contracts with the ship in which he engages to serve ? It is not only to navigate her in favorable weather, but likewise in adverse weather inducing shipwreck, to exert himself, as the chief justice expresses it, to save as much of the ship and cargo as he can. It is a part of his bounden duty in his character of a seaman of that ship. It is certainly a laborious, and probably a dangerous portion of his service, but certainly not less a service, and a meritorious service on those accounts. In performing that duty he assumes no new character. He only discharges a portion of that covenanted allegiance to that vessel which he contemplated, and pledged himself to give in the very formation of that contract which gave him his title to the stipulated wages.

I ask, is he to have no recompense for this continuation of this service in its most formidable shape, which that service to that ship can assume ? Nobody, I think, ventures to say that. But, say they, he should have it by way of salvage, or on a *quantum meruit*. There are, I think, decisive objections to both these views of the matter. The doctrine of this court is justly stated by Mr. Holt—that the crew of a ship cannot be considered as salvors. What is a salvor ? A person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any preëxisting covenant that connected him with the duty of employing himself for the preservation of that ship ; — not so the crew, whose stipulated duty it is (to be compensated by payment [ \* 237 ] of wages) to protect that ship \* through all perils, and whose entire possible service for this purpose is pledged to that extent. Accordingly, we see in the numerous salvage cases that come into this court the crew never claim as joint salvors, although they have contributed as much as (and perhaps more than) the volunteer salvors themselves. I will not say that in the infinite range of possible events that may happen in the intercourse of men, circumstances might not present themselves that might induce the court to open itself to their claim of a *persona standi in judicio*. But they must be very extraordinary circumstances indeed ; for the general rule is very strong and inflexible that they are not permitted to assume that cha-

racter. As the law stands, generally they are excluded from it upon just grounds.

A proceeding for salvage would be less beneficial and safe for the owners if permitted. In a salvage case you must take into consideration the *quantum* of personal danger incurred, the value of the property saved, and other circumstances which may influence the demand of salvage, whereas the rule of wages presents only a stipulated sum which in no case can be exceeded. By the same rule, every temptation to throw the ship into situations of danger with a view to an extravagant salvage is effectually removed; for no increase of danger can bring to the mariner an increase of profit. I may add from experience in such cases, that such experience does not invite the court to adopt a rule, which, in the conflict of numerous affidavits—impossible either to be reconciled, or to receive a decided preference, too often leads to conclusions founded rather in the conjectures of an honest hope than in the confidence of a satisfactory judgment. \* To most of these objections the rule of *quantum* [ \* 238 ] *meruit* is equally obnoxious, and they are both equally exposed to the inconvenience of driving the parties to sue for an unliquidated sum; the one party hardly guessing what is proper for him to ask, and the other equally ignorant what he ought to refuse; and the court having to find the proper liquidation, often on evidence sworn on both sides with equal intrepidity. On all views of the relative justice between the parties and of the public policy and convenience, there can be no doubt that the rule of wages has the advantage upon the clearest grounds; but take it upon the most naked principles of law applying to it, the contract covers the whole ship, one part as well as another, and no one part more than another, with the mariner's lien. A part separated by a storm is not disengaged by that accident from that lien. If it be recovered, it is recovered as a part of the primitive pledge mortgaged to the mariner. Again, when does the authority of the master cease? His authority does not certainly merge in the misfortune, nor are the seamen at liberty without staying a reasonable time for the recovery of parts of the ship and cargo (if there be any prospect in his judgment of such recovery,) immediately to disperse themselves over the country on whose shores they have encountered the mischance, without some discharge from him. No such attempt was made in the present case; they received their discharge, and not till then considered themselves as emancipated from his authority. The duty of service survives as long as the rights of authority exist; their relations are created by the same contracts; they have a cotemporary origin, and

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The Pitt. 1 Hagg.

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[ \* 239 ] a \* corresponding termination on all just construction of that contract.

Upon all these grounds of the general practice of maritime states, upon the just policy of the rule, its simplicity and convenience, upon the legal nature and duration of the original contract, and upon the understanding of the law which has generally, though silently, prevailed, that I adhere to the spirit, I had nearly said the letter, of what I am reminded of having said in a former case not exactly upon this question, "that a seaman had a right to cling to the last plank of his ship in satisfaction of his wages or part of them."<sup>1</sup> Be it remembered, that by the general and just policy of all maritime states, the total loss of the ship occasioned solely by the act of God visiting the deep with storms and tempest, brings with it the loss of all the earned wages, (except advances,) although the general rule of law is, that the act of God prejudices no man; and although the mariner has contributed nothing to the mischance, but exerted his utmost endeavors to prevent it; and although he is prohibited by law from protecting himself from loss by insurance,<sup>2</sup> as his owner is empowered to do for him, it is surely a moderate compensation for these disadvantages, that he shall be entitled upon the parts saved, as far as they will go, in satisfaction of his wages already earned by past services and perils.

The court admitted the summary petition; and the owners discharged the wages according to the schedule annexed to it.



[ \* 240 ]

\* PITT, Crosse.

February 25, 1824.

Sale of a ship by the master in the West Indies. On the decree of a warrant of arrest at the instance of the original owners, the court declined to disturb the possession.

THIS was a cause of possession. It appeared, that on 2d February, 1820, Messrs. Luke, Ayles, and Weston, the legal registered owners, chartered the above ship of 369 tons burden to John Crosse, the then master, for a voyage from London to the islands of Nevis and St.

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<sup>1</sup> Sydney Cove, 2 Dod. 13.

<sup>2</sup> [The Lady Durham, 3 Hagg. Ad. R. 201.]

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The Pitt. 1 Hag.

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Christopher, with liberty to touch at Madeira, and back to the port of London. The owners were to receive 1,000*l.* as freight; and it was stipulated that the ship should not be detained in the West Indies beyond the 1st of August. The ship sailed on 23d April, and arrived at St. Kitt's on 17th July, and was stranded on the beach of Basseterre on 28th August; her cargo was taken out, and the ship soon afterwards floated. Two inspections were made of the damage, and the necessary repairs were estimated at 2,152*l.*, the surveyors reporting "that it would be most for the benefit of all parties concerned that the ship should forthwith be sold." This report was attested by Mr. Woodburn. On 20th December the owners wrote to Crosse:—"We have been advised to abandon the ship, and call upon the underwriters for a total loss, which we have done. Under these circumstances, although we fully concur in opinion with you that to enter into repairs would be more than the value of the ship, we cannot now interfere in this matter. You, no doubt, will do every thing in your power for the benefit of the concerned." The ship was afterwards twice bought in at a public auction; and was at length, on 4th July, \* 1821, purchased by Mr. Woodburn, [ \* 241 ] a merchant of St. Kitt's, for the sum of 500*l.* Subsequently to the sale the master wrote to Hall & Co., his agents in London, (and they were also the agents of Luke & Co.,) in the following terms—"The public opinion was, and so it is at present, that I can give no good title to a purchaser under any circumstances whatever, without having a special power of attorney from the owners or underwriters for that purpose; and to remove the doubts, then existing on that point, with a view that the ship may bring a higher price, I have had the Attorney-General's opinion here, which is, that under all circumstances I could not give an unquestionable title. If this opinion had been otherwise, for me to have produced at the sale, a much greater sum might have been obtained." There was no proof that the purchaser was aware of this defect of title. Crosse, "acting as agent for his owners and the underwriters," executed a bill of sale of the ship to Woodburn, and a new register was immediately granted to him at the island. The vessel being slightly repaired, went to New Brunswick in ballast, from whence, having been further repaired, she returned with lumber, and proceeded to St. Eustatia, and subsequently to Halifax in ballast, and arrived at Liverpool, in October, 1823, with a cargo of timber from Cape Breton. The repairs were said to amount to 1,500*l.*, and the value of the ship when she quitted England was fixed at 3,500*l.* It appeared that no more than 250*l.* of the purchase-money had ever reached the house of Luke & Co.

For the former owners, *Lushington and Haggard*.

*Adams and Gosling, contra*.

[ \* 242 ] \* JUDGMENT.

LORD STOWELL. This is a case in which the court is prayed to transfer the possession of a ship from the present possessor and owner, as he describes himself, to other persons who were the former owners of her : the fact that she so belonged, is not denied ; but it is charged, that the ship has been unlawfully transferred to the present possessor by a course of transactions entirely fraudulent, and incapable of conveying a just title.<sup>1</sup> The ship is an extremely old ship, and has been very much worn, both by time and tempest : she originally belonged to Messrs. Luke, Ayles & Co., merchants of this town, the persons who now are attempting to dispossess the present possessor. In the month of April, 1820, she was chartered by these gentlemen in London to carry a cargo of merchandise and wine (to be taken in at the island of Madeira) to the West Indies, and not to stay there beyond a time limited for her return to the port of London. The ship sailed to Madeira, thence to Nevis, where she delivered part of her cargo, and thence to St. Christopher's, in her passage to which latter place she sustained so much damage in a storm, as occasioned her detention there for a considerable time to receive repairs : the cargo was taken out, and the ship was there sold by the master, without any authority (as it is alleged) from the registered owners, to [ \* 243 ] the \* present claimant, Mr. Woodburn, for 500*l*. She was afterwards carried to a port in America, where timber is plentiful, received some further repairs there, and traded subsequently between America and the West Indies. She has since arrived at Liverpool, and has been there arrested by the process of this court, at the suit of the London merchants.

The case then is, in reality, an inquiry into the title of the present asserted proprietor to hold the ship ; and the first, I had almost said the only question is, how far this court is authorized to make this inquiry, and provided with due powers to make it with effect. The court is, certainly, in the habit of transferring possession from the actual holder, sometimes by its own movement, sometimes at the

<sup>1</sup> Of the sale of a ship by the master, see the cases and authorities collected in Abbott on Shipping, p. 1, c. 1. s. 2, and Holt, 2d ed. p. 2, c. 3. Also *The Partridge*, Betham, *supra*, 81 ; in the matter of *Blanshard*, 2 Barn. & Cress. 244 ; *Morris v. Robinson*, 3 B. & C. 196 ; *Robertson v. Clarke*, 1 Bing. 445. [*Pope v. Nickerson*, 3 Story R. 465.]

instance of other courts which have no direct power for that purpose; but it considers itself, and is bound to consider itself, as moving within very narrow limits, if it proceeds at all originally upon a question of title. It, undoubtedly, would not be inclined, in any case, to transfer a possession without regarding the title of the party who claims the transfer; it must be satisfied that he is *potior jure*; and it must be in cases extremely simple that it acts on a merely preferable title to be reached by its own judgment. Where the possession is gained by force and violence, or by a fraud manifest upon the very face of the transaction; or where the party in possession is avowedly entitled only as a minor owner in opposition to the majority of interests, there the court feels no hesitation; but where a course of transactions involving fraud is objected, it declines entering into the question, and leaves it to be \*determined by the inquiry of [ \* 244 ] courts which have ampler means of arriving at the real truth, and the real justice of the case; for there may be some incidental matters — such as repairs, and other expenses, requiring the application of equitable principles which this court may not feel itself competent to administer. I may, therefore, lay it down as a rule for the conduct of this court, that it is only in simple cases, in cases which speak for themselves, that it can act with effect; but in those which, being complex, require a long and minute investigation, it cannot proceed with safety.

To which of these classes does the present case belong? I have no hesitation in saying to the latter class. Here is a series of transactions, charged on the one side to be fraudulent, and on the other denied to have the slightest intermixture of fraud in them. Many documents are produced, and some are not forthcoming which, upon such a question, ought to be produced. It is not then for this court, under these circumstances, to proceed to the length of a judicial determination; but if I am called upon for an opinion, which, after what I have said, must be considered rather extra-judicial, I can say confidently, that I see nothing that impeaches the title of the purchaser. It appears that there was ample authority given to the captain to sell, both by the conduct of the parties at home, and by the circumstances in which the property was placed. It appears also to me that in the sale all due caution was used, and all due attention shown to the interests of the former owners, and that the previous authority of the master was fully confirmed by subsequent \*recognitions and approvals. This is my general view of [ \* 245 ] the case; another court may, on further evidence, determine that my opinion is incorrect; but, under the conviction of my mind,



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The *Raikes*. 1 Hagg.

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it is proper for me to hold my hand, and to desist from ulterior measures. I shall not disturb the present possession.

In this state of the case, I shall not say any thing upon the matter of costs. I will allow a time for the former owners to go to another court; and if that court should be of opinion with me, that this is an unjust molestation, I shall think that the present possessor will be entitled to his full expenses, and to demurrage. If, on the other hand, it should appear, what I do not think can; upon this evidence, that he is a tortious possessor—then the original owners must be indemnified. I will suffer the cause to stand over for the space of one fortnight, for the purpose of ascertaining whether any proceedings are instituted in any other tribunal.

NOTE. No further application was made to the court in the cause, and the warrant of arrest was superseded.

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[ \* 246 ]

RAIKES, Gardiner.

May 7, 1824.

Award of commissioners, under 1 & 2 G. IV. c. 76, reversed: effective salvage services by steam-boats encouraged: additional remuneration decreed.

THIS was an appeal from an award of certain commissioners, appointed by the Lord Warden of the cinque ports, (under the provisions of the 1 & 2 Geo. IV. c. 76,) to determine differences relative to salvage.

For the salvors, *Lushington*.

For the owners, *Jenner*.

#### JUDGMENT.

LORD STOWELL. This is a case of salvage-service performed by the *Monarch* steam-packet; and it is the first case in which a compensation has been claimed, in this court, for the services of a vessel of this peculiar character: I am, therefore, inclined to give as much encouragement as possible to similar exertions, on account of the great skill and the great power of vessels of this description. It ap-

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The Countess of Harcourt. 1 Hagg.

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pears that the ship that was delivered from her perilous situation was a West Indiaman of considerable value; she was homeward bound, and with her cargo is estimated at the value of 12,500*l.*; and though the actual service performed is not to be measured by that value, yet it is not to be left entirely out of consideration: it affords the court an opportunity of doing that, which it cannot in many cases — giving an adequate remuneration.

The ship was in the Downs — in a situation of actual apprehension, though not of actual danger; she had solicited the attention of a Deal boat, — a class of boats, as is well known, very active, and eminently useful, in conducting vessels into \* Ramsgate harbor: she had removed the vessel from the [ \* 247 ] sand upon which she had struck; but still there was an apprehension of danger; and provision was required to be made for the future safety of the vessel. It was recommended that a steam-vessel from Dover should be sent for: it, therefore, cannot be denied that the agency of a steam-boat was considered highly useful and desirable: the boat has also merit from the alacrity with which she quits the harbor; she goes out, it would seem, at some risk, — it being an hour after high water; and upon reaching the vessel she lies by her all that night — a night in the month of December, — watching and attending her, and ready to perform any service that may be required the next day, when she transports her into Ramsgate harbor. The vessel was of great wealth: she resorted to the assistance of a steam-boat, after having resorted to one of a lower species; so that, on the whole, I think, I should have given more than the commissioners: 115*l.* does not appear to me to be an adequate reward, and I shall propose a moderate addition, by making the retribution 200*l.*, and the expenses of this appeal.

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\* COUNTESS OF HARCOURT, Bunn.

[ \* 248 ]

May 7, 1824.

On a contract, "to V. D. Land and elsewhere, and back to London:" held, that a forfeiture of wages was not incurred by the refusal of a mariner to work during a voyage to Rotterdam.

This was a suit of subtraction of wages. It was argued on the admission of a summary petition by *Lushington*, for the mariner, and by

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The Countess of Harcourt. 1 Hagg.

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*Jenner and J. Addams, on behalf of the owners.*

JUDGMENT.

LORD STOWELL. This is a suit by a mariner against a ship entitled *The Countess of Harcourt*. It comes on upon the admission of his summary petition,—that is the only document before me, and it describes the voyage, for which this man engaged, to commence “at the port of London, from thence to go to Van Dieman’s Land *via* Cork, and back to London.”<sup>1</sup> The ship sails, in the service of government, with a cargo of convicts; she deposits them at Sydney, in New South Wales; and afterwards she goes to Batavia, and, in the course of her return voyage, arrives in the Downs, when the captain proceeds to London, where he receives directions to go with the ship to Rotterdam. The first question is, what was the engagement which the mariners entered into when the voyage commenced? Was it as laid in the summary petition? It is said, that the terms of the petition do not give the true description of the voyage as set out in the contract; but as appears upon the articles themselves, London was to be the final and terminating port. It is [\* 249] quite manifest that nothing of an ulterior voyage is mentioned in the articles; and it is stated in the petition that five sailors objected to accompany the ship upon her new destination, three of whom were dismissed with their wages. The petition proceeds to state, that the present complainant and another mariner continued in the vessel during this further voyage; but they declined the performance of any duty until the arrival of the ship in the port of London. It is now contended, that this ulterior voyage was within the contract, and that the refusal of the mariner to work during its continuance amounts to an entire forfeiture of his wages. In my opinion, however, what the seamen were not bound to accede to cannot be considered as such a desertion of their duty as to amount to any forfeiture whatever. The owners, it would seem, had reserved in their own minds the final termination of the voyage; but I must say that both parties have a right to know what is the precise voyage for which they undertake to contract. It may be said that the alteration is slight—that it is a very little prolongation of the voyage; but it is perfectly clear that the seamen are not the less entitled to know that. This, however, may not be so under some circum-

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<sup>1</sup> In the mariner’s contract, the words “and elsewhere” were inserted after “Van Dieman’s Land *via* Cork.” See *The Minerva*, Bell; and George Home, Young, *infra*. [*The Westmoreland*, 1 W. Rob. 227; *The Ada*, 1 Daveis, R. 407.]

stances : the ship might have been detained in the Downs for a fortnight, or even for a greater length of time. We all know what happened in the expedition to the Helder, when there was a detention of the transports for several weeks in the Downs by an opposition of the winds, and this may frequently happen upon a destination to Holland from the prevalence of easterly winds. It was said, that the construction contended for, on the part of the owners, was necessary for the protection of the commercial interests of this country : \*be it so; but it is fit that such a construction should [ 250 \*] be stated, and be equally known to the mariner as to the merchant. It was also averred, that the permission given to three of the seamen to leave the ship was an accommodation and indulgence to their infirmities; but this does not appear in the summary petition; and it is not the private and unauthorized statement of counsel that the court can take against the averments of an allegation.

Upon the arrival of this ship in the Downs, a natural desire would spring up in the breasts of the men to return to their homes, and visit their families. The voyage had lasted a year; it was now to be prolonged by an order for the ship to go to Rotterdam; and it was admitted in the argument, that by the same rule of construction the owners might have sent her on to Russia. The court would, I think, be doing a great injustice to the mariner, if it put such a construction upon this contract as to say, that he had been guilty of such a disobedience as to effect a total forfeiture of his wages. Let the power of change, reserved in this case by the owners to themselves, be announced to the other contracting parties, that each may act for his own interest. The seaman is entitled to know the covenants which are to bind him. Here an alteration of the voyage takes place, perfectly unforeseen and un contemplated by the sailors, and it detains the ship out for a month. I cannot, under the terms of this contract, consider that they were bound to accede to it; their conduct, in my opinion, amounts to nothing like a desertion: I therefore admit this summary petition.<sup>1</sup>

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<sup>1</sup> The owners paid the wages and costs.

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Ca Ira, Censeur, L'Expedition. 1 Hagg.

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[ \*251 ]

## • PRIZE COURT.

CA IRA, CENSEUR, L'EXPEDITION.

May 18, 1824.

A monition, calling upon a prize-agent to exhibit distribution-lists, not enforced.

ON the 14th of March, 1795, the above-named French ships of war were captured by the conjoint British and Sicilian fleet, under the command of the late Lord Hotham, and, in June, 1796, they were condemned in the High Court of Admiralty. In 1797, distribution of the proceeds was made; and in 1800 the amount of the unclaimed shares belonging to the British ships was paid into Greenwich Hospital. On the 26th of July, 1822, an order in council issued, directing, that in pursuance of two acts of parliament<sup>1</sup> passed in his late Majesty's reign, "all sums of money arising out of the proceeds of prizes and captured places, now remaining in the hands of any prize-agent or agents, or other persons, or paid over to the treasuries of Chelsea and Greenwich Hospitals, which may be due to the officers, seamen, or soldiers belonging to his Sicilian Majesty, on account of captures hereinbefore mentioned, (among which were the above named ships,) may and shall be paid by such hospitals, to his Excellency Count Ludolf, (or to the Neapolitan minister for the time being, at the court of London, duly authorized to claim and receive the same,) to be by him remitted and disposed of, for the benefit of the persons entitled thereto." Under this authority, on be-

[ \*252 ] half \* of Count Ludolf, a monition was now prayed "against Nicholas Philipps Rothery, one of the distributing agents of the said prizes, and Thomas Collier, the surviving executor of the will of George Noble, whilst living, one other of the distributing agents of the said prizes, to bring into and leave in the registry the distribution lists of the shares of the said prizes belonging to the officers and crews of the Sicilian ships of war, Tancredi, Minerve, and Pallade, and to pay over the unclaimed shares arising therefrom to his Excellency Count Ludolf, or to show cause to the contrary."

In support of the motion, *Phillimore*. The question is extremely simple and short:—Whether a person, admitted to be a prize-agent, is bound, when called upon by competent authority, to exhibit prize distribution-lists, or vouchers and receipts as to matters in which

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<sup>1</sup> 47 Geo. III. sess. 1, c. 47; 48 Geo. III. c. 100.

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Ca Ira, Censeur, L'Expedition. 1 Hagg.

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he was concerned? We contend that he is so bound, and that it is not competent for a prize-agent to deny the possession of vouchers as to payments which he alleges to have been made. According to the notice of distribution in the London Gazette, dated 13th of June, 1797, the sum of 2,535*l.* was due to the Sicilian officers and crews as their shares of prize proceeds; and the order in council, which issued upon the representation of Count Ludolf, authorizes him to receive these proceeds. In August, 1822, he makes his first application to the surviving agent, who replies, "that the whole of the shares due on account of the Sicilian ships of war were paid into the hands of the then Neapolitan consul in London, to be by him transmitted for payment." But this was not so, and Mr. Lumley, \* the inspector of Sicilian prize accounts, carries on a [ \*253 ] further correspondence with the agent, Mr. Rothery, who still declines giving any satisfactory proof of the distribution having been made. It is alleged to have taken place in 1797, but the statements are so contrary, and the documents so inconsistent, that the court can place no reliance upon them. The other party have shifted their ground, and instead of adhering to the answer sent to our first application, a letter of agency is now produced, purporting to authorize a Mr. George Noble to receive the money from the distributing agents in this country; but upon the examination of it, it bears date two years and six months after the capture, and professes to contain the signatures of men who were dead at the time of its execution. It is consonant to practice as well as principle that a prize-agent should possess a receipt to exonerate himself, and we are empowered to apply for its production. 4 Geo. IV. c. 65.

*Lushington, contrd.* The statute cited was to enable Chelsea Hospital to pay out unclaimed dividends; it has nothing to do with the present question. This question arises out of captures made as long as twenty-nine years ago. The three agents who made the distribution have been long since dead; they had possession of the prize-lists and papers; and Mr. Rothery, against whom the present motion is prayed, did not return to this country till after the distribution was effected. The object of the order in council was to enable the Neapolitan minister in person and individually to claim the shares, and to act as the general agent for all parties: prior to that time the parties might \* have made their own claims, but [ \*254 ] they made none whatever. The payment of this money is satisfactorily traced, and completely discharges my party from any demand. Mr. Noble, who was one of the prize-agents for this property, distributed the shares of the division which included the Neapolitan

ships. He is clearly proved to have paid their shares to a person of his own name, (but in no way whatever related,) a merchant of Naples, who received the money under a power of attorney, duly executed by the officers and crews of the Sicilian vessels; and so far from there being any ground for impugning the validity of this instrument, the payment of the money was made to the person therein named, under its authority, and with the previous sanction of the Sicilian envoy in London. This is sworn to by the gentleman himself, who exhibits the power of attorney; and moreover, that he transmitted the money to the house of trade at Naples, of which he was then a partner, and that he verily believes the distribution to have taken place; for he himself returned to Naples in 1802, and continued to reside there between three and four years, and no application was ever made with regard to this account, which he considered was finally settled. It is also sworn, upon an inspection of the banker's books in this country, that a draft for the sum in question was carried to the account of the house of Noble & Co. of Naples, and that the draft was duly paid. It is, therefore, abundantly proved, that the shares were paid over to the recognized agent of the Sicilian government, which is sufficient to exonerate my party; that agent is living, and in this country, and has given Count Ludolf the fullest [ \* 255 ] \* information upon the subject, and has exhibited to him, and to Mr. Lumley, the documents annexed to his affidavit. And yet Mr. Lumley, and it is upon the strength of his affidavit that this application is made, swears, that the shares belonging to the Sicilian crews are not distributed, and that the money still remains in the hands of one or other of the agents, or their representatives. This statement is so manifestly inaccurate, and the whole proceeding is so vexatious and unjust that the court will not hesitate to reject the present motion.

#### JUDGMENT.

LORD STOWELL. If I thought that a more deliberate consideration of the affidavits and documents that are before me were due to the justice of this case, I would postpone giving my final opinion upon it to a future day; and the cause might then be further instructed, should any part of this remote and bygone matter seem to require it. But the court is entirely satisfied upon the question; and I should do an act of injustice if I were to call for more proof. This proceeding grows out of a very ancient transaction, partly a foreign transaction. It is an inquiry into a transaction conducted by a Mr. Noble, a partner in a house of trade at Naples, whom the parties, immediately interested at the time, thought it right to constitute their agent and

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The Eliza Ann. 1 Hagg.

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receiver; and the court must consider this gentleman as the authorized agent in this business, for the money is paid to him under the sanction and with the approbation of the Marquis de Circello, the Neapolitan minister then resident at this court. Such an authority, so given, absolves the agent in this country; there is an end of the \* act of navy agency here. What is an agent to do? [\* 256] He is not bound to go over to Naples, to see that the mariners receive their dues. He is to assign the payments to some respectable person; and, in this case, the British agent seems to have done so, and to a person of the captor's own choice.

I observe, also, that there is no affidavit, coming from any of the individual captors, negating the receipt of the money, and it appears that no such complaint or application has been received by the noble personage who has moved this inquiry. On the other hand, the court has it on positive oath that Mr. Noble received the money and transmitted it for distribution, and nobody denies it. I must, therefore, allow that Mr. Lumley's affidavit, upon which this application principally rests, seems to be erroneous. Some small objections were made to the accuracy of the instrument under which Mr. Noble was appointed; but they do not, in my opinion, touch the real merits of the case. The honorable person who has instituted this suit has acted very properly in conducting this inquiry so far; he has acted under the directions of his government. It is, however, quite impossible for me to demand further proof of a history so remote, and a transaction so distant, and where the party against whom this motion is prayed appears fairly exonerated from present liability. I shall, therefore, dismiss all further inquiry upon this subject.

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\* ELIZA ANN, Freeman.

[ \* 257 ]

May 25, 1824.

Illegal importation into Jamaica. Sentence of condemnation affirmed. Effect of transshipment at an intermediate port. Mitigated system of colonial law.

THIS was an appeal brought by several claimants, upon the condemnation of the above schooner, and of a cargo of flour by the Vice-Admiralty Court of Jamaica, for illegal importation into that island. The arguments chiefly turned upon the construction of 28 Geo. III. c. 6, and 58 Geo. III. c. 27.



For the respondents, *King's Advocate* and *Jenner*.

For the appellants, *Adams* and *Lushington*.

JUDGMENT.

LORD STOWELL. A great deal of elaborate argument has been employed illustrative of the system under which the trade of importations into the British colonies was permitted to be carried on at the time of this importation. This court has reason to lament, on its own account, and still more on the account of those who are liable to be affected by the application of this system, that the numerous statutes which compose it are left in a state of rather doubtful interpretation, very embarrassing to the courts of the colonies and to the professors of law there, and still more to merchants, and foreign merchants particularly, whose interests are placed in a state of doubtful controversy respecting what is permitted to them and what is prohibited.

The statutes are many in number and various in their regulations, generally pursuing, in later times, a mitigated and mollifying system, softening the rigor of the exclusive and prohibitory one which [ \* 258 ] preceded them. But it appears to be a depending \* question, much agitated there, whether the later statute abrogates the general system of those that preceded it, though not repealed in direct terms, or whether it leaves untouched and in operation those clauses to which no positive repeal is applied, and upon which there is matter left on which they can operate. This is a question left to be discussed and settled rather upon technical and legal principles, than upon such as are practically obvious and intelligible to common apprehension. A few words inserted in the later statutes, defining more explicitly the limits of the intended alteration, would certainly contribute much to general convenience. Upon the general question, however, the present occasion does not demand from me any opinion of my own; for the present question does not appear to turn upon the interpretation of statutes, for the statute upon which this particular case is to be decided has already received its interpretation by a decision in this court, which, not being reversed by any judgment of any appellate jurisdiction, is at least a binding authority for this court itself.<sup>1</sup> The statute, which is that of the 58 Geo. III. c. 27, declared, "that it shall be lawful to import grain, flour, and certain other enumerated articles, into his Majesty's West India colonies, in British

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<sup>1</sup> The *Matchless*, Vint, p. 98, and, upon the effect of an intermediate shipment, see p. 106. But *vide* p. 263, note.

ships, from any West Indian colony under the dominion of a foreign European sovereign."

The facts of the case are, that this cargo of American flour and corn was brought from America in an American ship, and into the island of Cuba, \*in the neighborhood of Jamaica, [ \*259 ] there immediately transferred into what may be admitted to be a British ship, and in that imported into Jamaica. The question then arises, whether this is an importation from America or the neighboring island of Cuba; if from the latter, it comes under the protection of the statute, which allows an importation from foreign islands or colonies. But if it be deemed an importation from America, notwithstanding this act of a hasty decanting into a British ship at Cuba, then, according to the construction of the statute, adopted by this court, it is an importation unallowed by this statute; this court having decided that it was an essential and declared part of its policy to preserve to British ships the benefit of the whole navigation; or that, at least, a conveyance of the supplies up to the very last stage of the navigation, merely to be dropped at the very threshold of the British colony, was an abuse of the statute, contrary to a material part of its fundamental policy, and, therefore, coming within its prohibition. This view of the matter was expressly admitted in the argument delivered on the part of the claimant.

The question, then, is, whether the facts of the case constitute an importation from America, or a Spanish importation from Cuba. Now, the facts are these; and it is the decision upon these facts that in this court must entirely determine this case; for there is no question of law remaining here, if the facts are determined. The history of the transactions presented to the court is this: — The libel filed in Jamaica, against this ship and cargo, states a liability to confiscation, as created by prohibitory acts, subjecting them to that penalty. \* The claim, and still more the argument by which [ \*260 ] it is enforced, defends the innocence of the transaction upon the statutes referred to. The present case does not call upon me to engage in the controversy whether such a cargo of American produce must not be brought direct from America in an English ship. The fact is admitted that it came in an American ship, from what American port it does not appear, to the island of Cuba, an island that is next door neighbor to the island of Jamaica. It remains there for a very short time. The cargo was forced almost immediately into an English ship, which by a fortunate coincidence, produced by a misfortune, comes from Jamaica, ready to take in a cargo that might offer for that island. This cargo and this ship, by another coincidence of good luck, jump together, one wanting a cargo for Jamaica, and

the other wanting a ship for the same place. A bargain is instantly struck, and the cargo is taken partly from the wharf, where it had just before been deposited by the American vessel that had recently brought it, and partly from the vessel herself, no transfer of property appearing to have been made. The two shippers were settled at Cuba, the one American, the other a Scotch, or Irishman. There is no evidence that this cargo belongs to either or both of them. The ship having, with admirable celerity, got her cargo on board, and paid an export duty, (for there is no evidence of an import one being paid,) proceeds without loss of time, or hinderance of business, to the ports of Jamaica, in one of which she is seized.

Now, if this transaction were free from all suspicion of [ \* 261 ] fraudulent device; if the cargo was \* brought to the ports of Jamaica after having been fairly imported into Cuba, without any purpose of a voyage to that port being intended to be pursued by the American importers, it might raise that question, so much agitated among the lawyers of the colonies, whether the whole of the direct voyage from America to Cuba ought not to have been performed in a British ship. But if done with a view to the continuity of the voyage to the English colony from Cuba, and with a participation of the profits of such an adventure, it might be referred to that decision to which this court has already arrived in a former case, that it was done in violation of that protection which the legislature meant to give to British shipping, but still more if attempted through a machinery of fraud and colorable practice, intended to veil the true nature and character of the transaction; and I cannot but think that the whole course of this transaction, (though managed with some degree of dexterity,) does open itself to considerable suspicion of its being of the latter class; and if it only raised serious doubts of the integrity of the transaction, I should regard that as sufficient to decide me in supporting a sentence obtained in another court, enabled to view it with greater distinctness than this court can flatter itself with the means of possessing, at a distance of space and time so much less favorable to accurate inquiry.

But there is one presiding circumstance in this case (if I may so term it) which raises it much above the level of a case of mere doubt and suspicion, and that is, the circumstance that the same person is the acting manager of the concern both in the voyage from [ \* 262 ] America to Cuba, and in its \* sequel from Cuba to Jamaica.

Witnesses, to whose testimony I see no reasonable objection, depose that the ship Virginia, Ross, brought this cargo from America, under all powers of superintendence and management, of both ship and cargo, vested in Lowe, in the united characters of mas-

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The *Eliza Ann*. 1 Hag.

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ter and supercargo. Captain Barry deposes that Lowe himself informed him that he (Lowe) was the owner, and always called it his cargo, and lamented that he had not brought more flour and corn, as it would have put more money in his pocket. It is proved by other witnesses, that whilst the cargo continued on board *The Virginia*, it was considered by the whole crew as owned by the captain. When the ship arrives at Cuba she delivers her cargo, which continued landed on the wharf, ready for immediate shipment. There is no proof of any transfer of the property, and none of the payment of importation duties. By what is to be considered as merely a piece of singular good fortune, a Jamaica vessel, in want of just such a cargo, is driven by adverse weather, and against her own inclination, into this port of St. Jago. The cargo is immediately transferred on board this vessel, and two merchants are employed, not, as far as appears, for the purpose of conducting any sale, but merely as gracing the exportation of this cargo, by passing through the slight forms of the custom-house at its exit. Property they had acquired none, as far as appears, in this cargo; neither bills of lading nor invoices describe them as owners; but Mr. Lowe steps on board this ship, (by what authority does not appear,) as supercargo and consignee; and, as the bills of lading express, "empowered to sell the cargo for the benefit of whom it may concern." \* When arrived at Jamaica, and [ \* 263 ] the ship and cargo are there seized, he gives a claim for the two shippers at St. Jago, not as owners, but merely as shippers and consignors.

Under all these circumstances, and particularly under this last master circumstance, that he possessed all authority from the commencement of the voyage from America up to Jamaica, it is difficult to avoid this conclusion, that the transaction has been arranged by the same heads and conducted by the same hands; and that it constitutes one uniform course of operation, varied only in its form, just as far as the necessity for its success might require, and originated and pursued with an unbroken tenor of purpose, from its commencement to its final termination. It is upon these considerations that I think it my duty to pronounce that I am not justified in disturbing the sentence which has been already passed.

Sentence affirmed, but without costs.

*Note.* The above vessel and her cargo were condemned on the three first counts of an information filed under 28 Geo. III. c. 6, s. 2, and 45 Geo. III. c. 57. For a repeal of these acts, see 3 Geo. IV. c. 44, and 6 Geo. IV. c. 114.

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The Henry of Philadelphia. 1 Hagg.

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[ \* 264 ]

• HENRY OF PHILADELPHIA, Palesti.

June 15, 1824.

Award of Cinque Port commissioners reversed. Reduction of salvage compensation. Salvor's costs, on the appeal, refused.

THIS was an appeal from certain commissioners of the Cinque Ports to reverse an award of 320*l.* in a case of salvage. The ship was in ballast, and was valued at 2,500*l.*; she was the property of American owners, on whose behalf the present appeal was prosecuted. 1 & 2 Geo. IV. c. 76, s. 4.

In support of the award, *Jenner* and *J. Addams*.

*Adams* and *Lushington*, *contrà*.

#### JUDGMENT.

LORD STOWELL. It does appear to me that this award is a fit subject of appeal. The commissioners have adjudged this case without the information which is before me. A survey has since been taken of the state of this vessel. Before that had been done, she appeared to have sustained considerable damage. It is now clear, that the damage was of a most trifling and insignificant nature. There was no alarm about the loss of the ship; but owing to the mere ignorance of the master as to locality, she had got on the Girdler sand. The ship was light, being in ballast, and was perfectly well found in every respect, and, as was observed by Dr. Adams, the tide, in these summer transactions, is the great salvor. The services were performed in conjunction with the ship's crew; there was no sort of danger, no intemperance of weather; the wind was moderate; and, in a few hours, the ship was liberated from the inconvenience of her situation

— for it was little more than that. It is as much as I can [ \* 265 ] do \* to consider it a case of salvage. The mere ignorance of the captain is of no importance in any view, for pilots might easily have been obtained. Nor are the boats to be considered, no injury having accrued to them. They did not go out on purpose, but were occupied in their common course of navigation. The commissioners, I think, were too much affected by local, and perhaps interested representations. In my opinion, about 5*l.* a man will be a proper compensation for these services, and I decree the sum of 125*l.* for that purpose.

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The San Juan Nepomuceno. 1 Hagg.

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*Jenner* prayed the costs of the appeal; but the COURT said it would not reverse that part of the award which gave the expenses of 17*l.*, incurred by the salvors before the commissioners; but the circumstances of the case were not such as to induce the court to grant their subsequent expenses on the appeal.

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SAN JUAN NEPOMUCENO, Yambi.

July 6, 1824.

Slave abolition laws. Upon a sentence of condemnation of a Spanish ship at Sierra Leone restitution decreed on appeal.

THIS was an appeal from the Vice-Admiralty Court at Sierra Leone. The above-named ship, having on board about 269 slaves, and no other cargo, while sailing under the Spanish flag, documented with Spanish papers, and the property of a Spanish subject, was, on her return (ostensibly) to the island of Porto Rico, from the coast of Africa, seized about thirty miles to the westward of Cape \* Mesurado, on 7th December, 1817, by Lieutenant Hagan, [ \* 266 ] of the colonial vessel of war Prince Regent, and detained; and on 12th February, 1818, was finally condemned at Sierra Leone, "as good and lawful prize." From this sentence there was an appeal;<sup>1</sup> and a claim for restitution, with costs and damages, was made, on the ground that the seizure was of a Spanish ship by a British officer, who had no right to stop or to search her in any way whatever; and that there was neither treaty, nor edict, nor any thing else, to show that, at that period, Spain authorized the seizure of such ships by British cruisers, and that there was no jurisdiction given to this country over captured vessels belonging to a Spaniard. On 12th February, 1819, an inhibition was decreed, and on 4th February, 1823, it was returned with a special certificate, and a further inhibition was extracted. Upon the cause being opened, the court remarked the great interval of time that had elapsed between the date of the sentence and any efficient prosecution of the appeal, and inquired the grounds of delay.

For the appellant, *Adams* and *Lushington*. No appearance was

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<sup>1</sup> Appendix A.

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The San Juan Nepomuceno. 1 Hagg.

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given on the part of Lieutenant Hagan till very lately. We could only serve him with a personal notice when he came to this country, in the course of last June, and we were unwilling to proceed in his absence. There are many instances of appeals from sentences abroad, which have not been prosecuted within the regular period, from the great distance of the parties, and where the courts of appeal, in this country, have granted time beyond that which strict law requires.

Some delay arose, in this case, from the want of funds, and [ \* 267 ] \* also from the change of agents ; but it has been of no inconvenience to either party ; for the papers and documents are the same now as they would have been upon an immediate prosecution of the appeal.

The *King's Advocate* submitted, that the original inhibition was taken out only one day prior to the expiration of the regular time, and that there had been no attempt to enforce the appearance of Lieutenant Hagan ; so that if any thing depended upon the acts of the opposite party, with regard to the prosecution of the appeal, there had been great delay.

PER CURIAM. A sentence of desertion should have been applied for — that is the obvious and proper remedy when an appeal is not duly prosecuted :<sup>1</sup> the party has failed to put in practice that protection which he could have claimed from the court.

The claim of restitution with costs and damages was then argued, and the principles laid down in the *Le Louis*, Forest, 2 Dod. 236, were relied upon, when the cause was directed to stand over for further proof on behalf of the respondent : and, on this day,<sup>2</sup> the *King's Advocate* stated, that as no fresh documents could be found, he had no wish to postpone the sentence.

The Court observed, that it was unnecessary to enter at any length into the case : it was decided by the *Le Louis*. The judge of the court below had allowed an asserted edict or cedula of the Spanish monarchy, to mislead his usual caution and discretion. [ \* 268 ] It was supposed, that by this ordinance, \* which (as far as the court is informed) has never issued, Spanish slave ships were open to detention, and were made subject to the jurisdic-

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<sup>1</sup> See *The Elizabeth*, Lisboa, *sup.* 226.

<sup>2</sup> June 15th, 1824.

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The San Juan Nepomuceno. 1 Hagg.

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tion of that country to which the seizing vessel might belong. And on this erroneous impression this cause seems to have been decided. It, therefore, was the duty of the Court of Appeal, however reluctantly, to reverse the sentence, and to pronounce for the restitution. The court, however, will withhold an attachment against Lieutenant Hagan, as the proceeds are out of his hands; and reserve the question of costs and damages for further inquiry and consideration.

Upon the reserved question, the *King's Advocate* now contended, that this was a case of *primæ impressionis* as to costs and damages: the seizure took place on 7th December, 1817, so that it occurred prior to the judgment in the *Le Louis*, and when the rule, laid down in the concluding words of that sentence, could not have reached Sierra Leone, for the instruction of the authorities there, and of those who acted under their guidance. A severe hardship will fall upon Lieutenant Hagan if he is now compelled to answer for costs and damages, particularly when the proceeds have passed into the hands of government, the slaves having been delivered over to the crown for emancipation; and there is nothing special in the circumstances of this case to prevent the court from following the sentence pronounced in the *Le Louis*.

*Adams and Lushington, contra.* Upon general principles of justice the foreign claimant is entitled to compensation. The seizure was illegal *ab initio*; it was made in a time of profound peace, and when no convention had made even a limited right of search allowable. The treaty of November, 1817, between [ \* 269 ] this country and Spain, confirms all seizures made before the ratification of the treaty; but this capture was made in December, and, therefore, subsequent to that ratification. The instructions that were given to Lieutenant Hagan are similar to those produced in the *Le Louis*, and we claim restitution with costs and damages on the principle established in that case: they are not vindictively sought, but they are not on that account the less due; and if the seizor has been misled by any accidental error of the authorities at Sierra Leone, the government at home will indemnify him. They cited *Madrazo v. Willes*, 3 Barn. & Ald. 353.<sup>1</sup>

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<sup>1</sup> See also *Forbes v. Cochrane*, 2 Barn. & Cress. 457. The slave abolition laws are consolidated by 5 Geo. IV. c. 113.



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The San Juan Nepomuceno. 1 Hagg.

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## JUDGMENT.

LORD STOWELL. The two propositions are difficult to be reconciled, 1st, that this British officer must be protected; 2d, that the foreign claimant is entitled to sue him for compensation. But how can I give a sentence of restitution with costs and damages as against this officer, when government has the property in its own hands? He has not the means of restitution; government has admitted the legality of the capture, by taking the property from him; and it is now discovered that the act of parliament does not operate in the case. It is not, therefore, peculiar to this officer to have erred in the transaction. Officers, it is well known, whose zeal frequently outruns their prudence and knowledge, are easily stimulated to [ \*270 ] \*enterprises of this kind by persons at Sierra Leone, who give advice much beyond their authority. The captor in this case seems to have been so misled.

It has been said, that the government of this country will indemnify him, and that a petition has been presented with that object; but nothing satisfactory seems to have resulted from it; for it was met with this reply—that government could not take the matter into consideration, while it was pending in this court. Now, if my sentence could be given upon a certainty that government would indemnify him, I should feel it consistent with justice to accede to the prayer of the claimant; but if my sentence should involve this British officer personally, I should very anxiously abstain from so doing, as long as I have any apprehension that he would be left to shift for himself. I should wish some further application to be made to government, and some more specific and definite answer given; if not, I shall certainly feel myself bound to protect this officer. But if it is necessary to give, for form's sake, a sentence, as prayed, I will do it; but not without knowing the effect.<sup>1</sup>

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<sup>1</sup> The claimant has since accepted a compensation, which was directed to be paid under a warrant from the Lords Commissioners of his Majesty's Treasury.

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The Agincourt. 1 Hagg.

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\* AGINCOURT, Mahon.

[ \* 271 ]

July 13, 1824.

On a charge of ill-treatment and undue correction, a justification — partly on the ground of an offence recently committed, and partly on account of antecedent offences,—not sustained.<sup>1</sup>

The law of England is the proper authority for fixing the limits within which one British subject may inflict corporal suffering upon another.

THIS was a proceeding instituted against the captain of an East Indiaman, in the private trade, for several acts of oppression and cruelty on the return voyage from Madras to England. The ship was of the burden of 440 tons, and had on board a crew of thirty-three men, and eighteen passengers.

The cause was argued by *Lushington* and *Haggard* on behalf of the mariner; and by *Phillimore* for the captain.

## JUDGMENT.

**LORD STOWELL.** This is a complaint brought by John Thompson, a man of color, against James Mahon, captain of 'The Agincourt, a ship in the East India private trade, for ill-treatment committed in three different acts on the voyage to England.

The plaintiff was shipped on the 11th of April, 1823, at Madras. He asserts in his libel that he was hired as cuddy cook, (that is, cook for the captain and passengers, who messed in an apartment denominated the cuddy,) but that in the course of the voyage he was turned out of his employment as cook, and forced to serve as a mariner before the mast. The captain, in his defensive plea, alleges that he was so hired; and in the ship's articles he does appear to have been hired as cook and seaman; but he denies that he so understood the hiring. He is a marksman; and the description of his two capacities is in the hand-writing of another person, which does, in a certain degree, lessen the \*force of the instru- [ \* 272 ] ment, and he says that it was never read over to him: his averment, therefore, is likely enough to be true, more especially considering the slovenly manner in which these contracts pass, and the careless and improvident manner in which they are attended to by

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<sup>1</sup> [Fuller v. Colby, 3 Wood. & Min. 1.]

the mariners themselves. The probability, too, is a little strengthened by the circumstance that a man is often engaged to serve in two such capacities together on board ships of the East India Company; and, I presume, these private traders are in every respect less commodiously equipped than the Company's ships, and sometimes commanded by persons of an inferior description. But, whatever the truth of the fact may be as to the character in which this man was hired, that fact is not sufficiently established in proof: and as he has received his wages under these articles, and thereby in a manner closed his account, I am not disposed to entertain this part of his complaint.

The other complaints are of acts of violence and cruelty, the principal of which happened on the 28th of July, 1823, when the captain is charged with various assaults, by striking and kicking this man, and finally with causing to be inflicted on him a public flagellation. Another act of violence, which is charged to have occurred prior to the 28th of that month, will be more particularly described and observed upon hereafter.

It has hardly been disputed, that in a case of gross misbehavior, the master of a merchant ship has a right to inflict corporal punishment upon the delinquent mariner; that right must be supported by the law of England, which is the proper authority for fixing [ \* 273 ] the limits within which one subject \* of this realm has a right to inflict corporal suffering upon another. Upon that ground, I dismiss all reference to the authorities of the foreign maritime law, and I regret that so little upon this subject is to be found in our own.<sup>1</sup> No statutable regulations exist upon this subject. The statute relating to merchant seamen is silent upon it;<sup>2</sup> the only authorities are supplied by the decisions of the courts of law, acting upon considerations of necessity and just discretion; and upon such grounds I think the following rules may be considered as sufficiently established. In the first place, that the punishment must be applied with due moderation. It is asserted in some well-considered books, that the law gives the same authority to the captain of a merchant ship to chastise his mariners for misbehavior, as a master possesses over his apprentices; meaning, that it is inherent in him, upon the same grounds of necessity and sound discretion in the one case as in the other, not certainly to be used exactly in the way

<sup>1</sup> See Abbott on Shipping, part ii. c. 4, s. 4, and the authorities referred to in the notes. Also *Rhodes v. Leach*, 2 Starkie, N. P. 516.

<sup>2</sup> 2 Geo. II. c. 36.

of an equal measure of punishment, because the apprentice is generally a youth of comparatively tender years, and whose acts of misbehavior can hardly produce the same destructive consequences as may attend the negligence of the mariner — an experienced person, of confirmed strength, capable of sustaining a severer infliction than could properly be applied to a stripling; and whose acts, even of negligence, may draw after them consequences fatal to all the lives \* and all the property on board a vessel. It is [ \*274 ] hardly necessary to add, as a corollary, that in all cases which will admit of the delay proper for inquiry, due inquiry should precede the act of punishment; and, therefore, that the party charged should have the benefit of that rule of universal justice, of being heard in his own defence. A punishment inflicted without the allowance of such benefit is in itself a gross violation of justice. There are cases, undoubtedly, which neither require nor admit of such a deliberate procedure. Such are cases where the criminal facts expose themselves to general notoriety by the public manner in which they are committed, or where the necessity occurs of immediately opposing attempted acts of violence by a prompt reaction of lawful force, as in the disorders of a commencing mutiny: these are cases that speak for themselves, and are of unavoidable dispensation. It may be matter of prudence, but it is not matter of strict obligation, in vessels of this kind, (though I understand it to be so in the ships of the *East India Company*,) that the captain should communicate with other officers of the vessel; nor do I find that any particular mode or instrument of punishment has received a particular recognition; that must be left to the common usage practised in such cases, and to the humane discretion of the person who has the right of commanding its application.

The defence opposed to a charge of cruelty, such as is alleged to have been practised on the 28th of July, may consist in a total disapproval that any such cruelty was practised, or may be a justification of it by proofs of the misconduct that provoked it; and that misconduct may be confined to an offence immediately preceding, or may \* likewise include similar offences antecedently [ \*275 ] committed; and which, upon the recurrence of them in the particular case, will justify the punishment as a preventive measure, to guard in future against the inconveniences that may reasonably be expected to attend a repetition. The first mode of defence is, I think, not attempted in this case; it is not denied that acts of violence were used; the defence is that of justification — partly on account of an offence recently committed, and partly from similar ones

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of a preceding date, indicating bad habits, which could alone be repressed by punishment.

This mode of defence has led to a voluminous mass of evidence, reaching almost unavoidably into the prior history of both parties, of their habits, of their dispositions and conduct, much of which might have been spared without detriment to the real merits of the question, which alone is the proper subject of determination. I think it may be added, that the last mode of justification, by a reference to by-gone acts, is the last which the court would be inclined to favor. If unpunished at the time they took place, time has thrown a species of condonation over them, as well as a degree of obscurity and indistinctness in the evidence of the manner and circumstances under which they took place. It might likewise be observed, that the impunity shown to former offences may have greatly contributed to produce the present; and it is a material objection with the court, that the admission of this mode of defence leads to a great accumulation of expense, bearing very hard upon the seaman in the exertion of his legal right to enforce his claims.

[ \* 276 ] The justification commences with a charge, \* that Thompson had immediately before beaten severely William Burgess, who acted as cook's mate under him. There can be no doubt whatever that he was cook's mate under him, and that, notwithstanding what is said by a few incautious witnesses, the principal cook, this black man, Thompson, would have been answerable for any impropriety in Burgess's conduct as under cook; for his character of baker would not have given him independence in his character of under cook. Burgess himself hardly ventures to say more than that, if he had been guilty of the act imputed to him, he should have been more blamed than Thompson, appearing to admit thereby that it was possible Thompson might have been blamed, though not more or so much as himself.

If the fact was such as is described, that Burgess had washed some rice, given to him to be prepared for the breakfast of the several passengers on board who messed with the captain, in a tub of water, in which water a bucket, which had been used by the children of some of the passengers for their necessary purposes, had previously been washed; even supposing that his principal had struck the first blow, though possibly the law might have frowned a little upon such an aggression, I think there is no man whose honest passion would not have silently applauded such an act of resentment, committed in consequence of such an abomination; but be the merit or demerit of such a blow what it may, it belongs not to this man of color; for, notwithstanding all the encomiums bestowed upon the pacific and

mild disposition of this under cook, I consider the fact as proved that he was the first mover in this business of pugilism, and entered into a contest for which he turned out to be very \* poorly [ \* 277 ] qualified. Latimer in his deposition states, that it was his duty to be on deck by four o'clock in the morning, to attend to the live stock ; and being close to the galley door, Thompson gave some rice to Burgess to wash for the cuddy ; that he saw him wash it in the dirty water, upon which Thompson makes an inquiry why he did this ; Burgess then used some opprobrious expressions, and challenged Thompson to fight, and that Burgess struck the first blow. Gregory, one of the seamen, also says, that Burgess offered to fight Thompson, and struck Thompson a blow, which he returned.

That Burgess struck the first blow is proved without any contradiction on the part of the captain, for no contradiction is attempted. In consequence of this defeat, Burgess runs away to the captain, exhibiting the disorderly marks which he had himself provoked, and charges his principal Thompson. The captain sends immediately for this man, and without hearing a word said in explanation or defence of his conduct, for it is so specifically pleaded in the libel, and is not denied in the responsive allegation, treats him with brutal violence, by kicking him, collaring, and striking him about the head, and using the most provoking and insulting expressions.

Now, undoubtedly, the complaint was not what required an instant infliction of punishment. It was, then, the bounden duty of the captain to hear Thompson in extenuation and justification of his conduct ; and the first thing that strikes me, and what is established beyond all doubt, that the complaint is received without hesitation. Here, at the commencement of the business, is a violent departure from that rule just laid down.

\* Ford, one of the witnesses, deposed that the captain sent [ \* 278 ] for Thompson, and upon his going aft to him, asked what he had been doing ; and, before Thompson could give him an answer, the captain took up the maintop-sail clue line, and with the end thereof struck Thompson repeatedly ; he also struck him with his fist about the face and head, shoved him from him, and kicked him, so that he staggered against the water-cask.

At a later hour of the same day, without consultation with any officer, without, so far as appears, any declaration whatever to the crew of the offence for which the party was to suffer, he has him exhibited as an object of a public and disgraceful punishment, and performs the office, which does not often fall to the lot of a captain, of executioner himself, in some degree, as he assists in tying him up, and in manufacturing the instrument employed ; he also redoubles

the *quantum* of punishment at first denounced, censures the person acting for not performing his duty with sufficient effect, and then sends him down to his galley, smarting; and, as is usual after severe punishment, directing the surgeon to attend to the wounds which he had received, under which he was rendered incapable of performing duty for several days. I do not mean to say, that the torture inflicted by the instrument of this public punishment was, if I may judge from its present appearance, very cruel; the cat was made out of the old log line, which certainly appears to have suffered from the effect of time, and the knots which the captain himself introduced into it, left several of its component parts in a very loose and dishevelled state;

at the same time, if the surgeon is to be credited, and I see [ \* 279 \* ] no just \* reason to dispute his credit at all, it was not with-

out leaving serious impression upon the man's person; and as to the bravado<sup>1</sup> imputed to the sufferer himself, upon which much stress has been laid, if he really used any, I cannot consider it as much more than the same kind of bravado that usually follows a similar act of discipline in any of the great schools of this kingdom.

I think there is reason to suspect that the punishment was observed by the crew with feelings very different from those of approbation. Mokler, one of the captain's witnesses, mentions one of the crew saying, it was a shame for them to stand by and see Thompson tied up, and that he would make one, meaning as the witness understood, to rescue him.

Now, upon looking back upon the whole course of this transaction, I am under the necessity of saying, that it has, to my apprehension, much more the features of intemperate and unjust passion, than of reasonable and due correction: it is perfectly clear that the captain himself was totally unacquainted with the real origin of the transaction, except from the single information which he received from the complainant. He makes no inquiry as to the occasion of the treatment complained of; for it is also perfectly clear, that if he had, the punishment must have been transferred to the original delinquent who committed this foul act, and who likewise is proved by Gregory and Latimore to have given the first blow, on his being reprimanded for such a gross departure from his duty.

[ \* 280 ] \* I have already observed that a recent act, though of a lighter kind, might not unjustly be visited by a more serious punishment than was due to it, standing perfectly alone, if antecedent acts of the same kind had proved the existence of habits too

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<sup>1</sup> "That he had often received five times as much on board a man-of-war before breakfast."

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dangerous to be passed over upon the repetition. It should properly be an act allied in nature to those which it follows : an act of theft will not prove a habit of drunkenness ; if an act of mutiny is charged, it should be mutinous conduct of a former date that alone can be invoked with propriety to aggravate the charge of a mutinous disposition. The defence in this case has not at all conformed to this principle, for it has travelled into charges of a very different nature from that which is charged as the justification of the present punishment. The first of these charges is that of a robbery of some clothes committed by the mariner, and almost immediately after his admission into the service of his master. All that is proved is, that, soon after his admission, he was summoned to appear before a magistrate at Madras, to answer the demands of a person on shore for some clothes that were missing. The whole business wears the aspect of a civil procedure merely ; he goes readily on shore, appears before the magistrate, claims the clothes as his own property : his claim upon the hearing is not allowed by the magistrate, who decides in favor of the other party. He is dissatisfied with this judgment, and has thoughts of an appeal, but is prevented from appealing by the necessity of attending the motion of his ship, which was to sail in a day or two, and the matter is settled by compromise with the other claimant, who accepts a sum advanced by the \*captain, [ \*281 ] who was desirous of retaining his cook ; and the repayment of the sum, being about four pounds, for the clothes, was secured to the captain by a deduction to be made from this man's wages. I think it impossible upon any ground to consider this ambiguous fact as laying foundation for the charge of a mutinous disposition, or indeed of any offence of the nature of robbery.

Another charge is, that of an intention to commit a desertion ; and the whole foundation of that which appears is, that he went on shore at the Isle of France with one of the passengers after the business of the day was over, and that, indulging in the habits which are too common with seamen, they were locked up in a prison as disorderly persons ; from which prison they might have been released the very next day if they had been applied for by the captain, or any persons on his behalf, and from which they were released upon the very first application made by him, the day before the sailing of the ship. This can never be construed into an act of desertion ; it is matter of controversy whether the seamen generally were authorized to go on shore ; but even considering it an irregularity, he might deem himself privileged by a sort of official character as cook ; and there is nothing in the course of the whole transaction by which he got himself into prison along with the companion of his frolic, that can sup-



port the charge of an intended desertion. He left his clothes on board the vessel; and a prison is surely the last place in which a man who meditated an escape would choose to risk inclosing himself.

Collier, one of the captain's witnesses, says, that he was [ \* 282 ] sent on shore by the captain to inquire after Thompson; \* and upon his going to the prison, the keeper offered to release him, if he, Collier, would give him an order to that effect.

Another offence objected to him is, that he was disorderly and mutinous; that it was absolutely necessary for the safety of the ship to put him in irons; that he, however, shortly afterwards broke out of the irons and hove them overboard. This is denied by Thompson, and, upon his oath; and, in my interpretation of the facts, disproved by the conduct of the captain himself. There was certainly such a charge brought against him at the time by the captain, whom Thompson describes to be at that time elevated by liquor; that he quarrelled with him without cause, charged him with disorder, and ordered him to be put in irons by the carpenter, who was likewise in a state of intoxication; that irons were brought into the galley where he was stationed, and there the carpenter, being in the condition described, only laid the irons across his legs, and bolted them without putting his legs into the shackles to secure them; and Thompson having been left in that situation, extricated himself without difficulty; and he positively denies throwing the irons overboard.

The question is, which of these representations is true. I am clearly of opinion, that the subsequent conduct of the captain proves that this mariner's account is the one to be preferred in point of credit; upon this plain ground, that otherwise the captain must have taken severe notice of such a direct and gross act of mutiny as this, of breaking out of his confinement and throwing the instruments overboard; whereas he was seen publicly walking about, [ \* 283 ] without restraint, immediately \* afterwards: no inquiry is instituted, and no proceeding whatever or subsequent punishment inflicted. It appears to me that the captain has little right to complain of a mutinous disposition, if a fact which took place as he described it was suffered to pass totally unnoticed.

Another imputation thrown upon him is, that he was not a good cook. One witness, Kerr, says that his manufactures were sometimes complained of, that the puddings were sometimes hard, and that the dough had risen heavy, misadventures which I presume occasionally visit the best provided families; but the fair result of the general evidence is, that he gave general satisfaction, and particularly to those who surely were the best judges, to whose accommodation he was very attentive, and on that account was deservedly a favorite.

It is objected that he was sometimes abusive and quarrelsome with the men. No particular account is given of these quarrels; and it is not at all unlikely that some of these quarrels, if they did happen, might have happened through the fault of others, rather than his own; but it must be remembered that a kitchen is apt to invite unreasonable demands, and is proverbially noted for creating a warm disposition in the person who is to gratify them. The evidence is much too vague to authorize any conclusions to his disadvantage in this respect. It is proved by several witnesses, that the captain addressed him occasionally by the title of "You black son of a bitch;" and it appears to be no intemperate or uncourteous retort, after an insult upon the color which nature had fixed indelibly upon him, to say that "his mother was a woman and [ \*284 ] not a bitch;" certainly a very meek and neat remonstrance, merely vindictive, and not in the least vindictive.

I think it is a strong argument in favor of this man's good temper and disposition, that after he was reduced to the condition of a common mariner he acquiesced in the change, though as he thought unjustly enforced upon him; and he is admitted by the captain's witnesses to have been an excellent mariner, and to have performed his duty as such during the remainder of the voyage in a most unexceptionable manner. I shall not enter further into the particulars of this man's history, as given by the captain, and which has produced, as might naturally have been expected, counter charges. The captain certainly is charged by several of the witnesses, many of them his own, as a man extremely passionate and churlish, who would never receive an answer; and this charge is, I think, sufficiently established. The charge of frequent intoxication is brought by some, but I think it not established in any such degree as to incapacitate him for the general command of the ship. It is variously described. One says he was sometimes "freshish," but not much "out of the way;" another describes him as "often intoxicated, but never beastly drunk;" and the general result of the evidence is, what I have before stated, that he was never disqualified for the general navigation of his ship; but the fury of his temper and the coarseness of his manners were violent and frequent enough to give him the appearances of great intoxication. I shall mention a few facts which are not denied, and which I shall leave [ \*285 ] any other comment than what every man's reflections must suggest to him upon the subject.

It appears that amongst his passengers was a Colonel Pereira, an officer in the service of our East India Company, with his wife and family; a man rather advanced in years, suffering under the infirmity

of weak eyes. Instead of sitting in the cuddy, the room where the passengers generally messed, he was obliged to retire to his own apartment with his wife, on account of the light affecting his eyes, and sent a request into the cuddy for a cup of tea; a requisition which one would suppose would have been instantly complied with; the answer was a refusal; the requisition was repeated, the colonel came up stairs, attended by his wife, and begged to know whether this refusal was given by the captain, who immediately avowed it; and, shortly after some words which had passed between them, the captain broke out into expressions of the most gross and insulting kind, most highly unfit to be used towards a gentleman in the situation which this officer held, both in point of rank and profession, and in respect of his time of life and personal infirmity; such as "a withered chopped old blackguard," "a Portuguese scoundrel," adding, "go down to your kennel, you old blackguard." Another instance may be extracted from the same and other witnesses, that out of the numerous passengers on board, two only remained to mess with the captain. It is, I think, a warrantable conclusion, from the whole history of what passed on board this ship, that the passengers were treated with a total want of that kindness and liberal hospitality which was due to their situation.

This appears to argue a harshness of nature, that might too [ \* 286 ] \* naturally produce acts of injustice towards persons under his legal command.

It appears that articles of the peace were preferred against the captain by Mr. Atkinson, the surgeon on board the vessel; that this gentleman was challenged by him to fight after it was dark with pistols; and that the captain was bound over by the authorities at St. Helena to keep the peace. Burgess himself admits, that he was a very passionate gentleman, but softens that description by saying that he never swore heavy oaths; to which another witness adds another temperament, "that he never swore, except in a squall." It is intimated that all this course of boisterous and tyrannical conduct stands upon the credit of the representation of determined enemies. But the fact is otherwise; for Collier, who, as I observed before, is one of the captain's witnesses, says, that he was a very passionate and also arbitrary man. Another of his witnesses, Hodson, also states him to be very passionate and arbitrary in his conduct, and that at times, when he was in liquor, he was apt to be very violent, having told him that he was "a damned rascal," and he would flog him if ever he could get hold of him. Mokler, another witness produced on behalf of the captain, says, that if the people were not quick and handy, he used to give them a box of the ear now and then.

But even supposing it to be the fact, that it is the representation

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of enemies, it remains to be considered whether this general enmity was not provoked by the very conduct so universally complained of. It was a just observation made by the counsel, that this captain must have been most singularly unfortunate, if he met with hostility in \*every quarter without having provoked it. It could [ \*287 ] hardly happen, that with the exception of a very few favorites, the animosities of such numerous individuals should have arisen against this person, if his own behavior had not been marked with qualities that gave a most natural rise to such general resentment against him.

Stover, whom the master raised to the situation of chief mate, from being shipped as boatswain, says, that the chief officer, the doctor, and the purser, and some of the crew left the vessel at Calcutta, and although they did not leave their clothes, they left their pay, if any was due. At Madras, three of the people who had entered at Calcutta, and one who came from London, entered on board a man-of-war. Bryden, who was the chief mate of the vessel, and appears to have been a master in the navy on half-pay, complained of the captain's treatment. The boatswain and several seamen left the vessel at Calcutta. Mr. Jones, the second officer homewards from Madras, left the ship at the Isle of France. Sloane, the carpenter, says that most of the officers and crew left the ship at Calcutta, and that some of the men who were hired at Calcutta entered on board a man-of-war at Madras. Collier, the steward, says, that all or most of the officers and crew quitted the ship at Calcutta, and believes they so quitted in consequence of the misconduct and improper severity of the captain. He hired a chief mate at Calcutta, who went no further than Bencoolen.

I omit many other matters which tend to establish the violence of this man's conduct, and shall not enter further into a description of the civil war, *bella pulsquam civilia*, which seems to have disturbed \*the peace of this vessel during the continuance of [ \*288 ] this voyage. No person can have read these depositions, I think, without retiring under a conviction that this captain had not, either from natural violence of temper, or coarseness of manners, or extravagant notions of his own authority and duty, practised such behavior as in any degree tended to conciliate the kindness and respect of others, or to entitle him to more favorable representations from others than they have given.

It is upon this view of the case that I must pronounce in favor of the mariner's complaint. I regret the inquiry into his preceding history and conduct has led him to this counter inquiry, which only confirms the impression made by the proof of the particular charge. The

question is now, to what extent redress is to be afforded to this mariner. The sum proposed in the libel is a compensation of three hundred pounds; that sum is excessive. It is within my recollection, that in cases like these, which were formerly more frequent than they are at present in these courts, it was common for each maritime witness to assign what he thought a proper compensation for a punishment unjustly inflicted, by declaring that he would not take such a punishment for less than such a sum, and estimating the compensation by the value which each man put upon his own individual skin. Of course that was an estimate which afforded little light to the judgment of the person who had to decide the question, and having been discontinued, it now affords him none.

I look with an unfavorable eye, in this case, upon the great expense to which the course of the defence has led — certainly with-  
[ \* 289 ] out any beneficial \* result to the party who has introduced it. It will unavoidably involve the plaintiff in an expense which must not be entirely left out of consideration.

In weighing this outrage, I feel that I am constrained to look to the expense which the plaintiff has been put to by the voluminous evidence exhibited in this cause on the part of the defendant. If I give costs, as I must undoubtedly do, there must be still some expense falling upon the plaintiff, and which will reduce the assigned measure of compensation; for a part of it will be applied to that other purpose of paying these charges, although I cannot estimate the *quantum* of this deduction. Let this consideration protect the court against the censure of following the example of the captain, in the indulgence of a degree of passion in the measure of punishment for the outrages complained of.

The plaintiff has had to meet a violent attack upon his general conduct, which I think he has sufficiently repelled; and he likewise has been engaged in a hostile retort which that attack unavoidably produced, and which he has competently established; all this is additional oppression, and must enter into the consideration, as well as the flogging, in the compensation to be pronounced due. I trust I am not so insensible of the duties of my own office, and of the necessity of supporting the maritime discipline of the country, as to be willing to sacrifice them both in any instance to the desire of obtaining a noxious popularity.

In giving this judgment, I mean to give an admonition to this person, and it may be useful to others — that passion is not  
[ \* 290 ] to be indulged in the \* infliction of punishment; and that he who has to command others is not fully prepared for the duties of that station, unless he in some degree command himself.

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I shall allow the sum of one hundred pounds, together with costs ; and I add the expression of a hope, that cases of the like nature, if they should occur, will be confined within narrower and more prudential limits than have been applied to the present case.

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### PRIZE COURT.

TRITON, Minderman.

July 16, 1824.

A prize-agent makes certain advances to captors prior to a regular distribution of the proceeds, and becomes a bankrupt: held, that the sureties and their representatives are liable for his deficiencies in the first instance; enforcement of a monition to refund, suspended.

THIS ship was captured by H. M. schooner, Bramble, (J. Nicholls, Esq., commander,) on the 7th July, 1815; and on the 23d February in the following year, was, with her cargo, condemned in the High Court of Admiralty; the proceeds amounted to the sum of 2,053*l.* 19*s.* On the 24th June, 1819, a monition issued, at the instance of the treasurer of the navy,<sup>1</sup> against Thomas Nicholls and Henry Crouch to bring into the registry of this court the sums respectively received by them on account of the said prize. Nicholls was to bring in the sum of 400*l.*, and Crouch 145*l.* 6*s.* 6*d.*, and also such papers and vouchers as were in their or \* either of their possession. An appear- [ \* 291 ] ance having been given for Nicholls, an act on petition was entered into, which set forth the capture—condemnation—sale of the ship and cargo—value of the proceeds, and the appointment of Peterick Lukey of Fowey, in the connty of Cornwall, as the agent of the captors; it further alleged, that distribution had not been made, and that on the 14th October, 1816, Nicholls prayed a monition against the agent to bring in the accounts of the sale, and proceeds. This monition was decreed; and on the 18th February, 1817, it was returned with an affidavit that it could not be served on Lukey by reason of his having absconded, and that he had become a bankrupt; whereupon the court decreed a monition against William Norway

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<sup>1</sup> See *ante*, p. 22.

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and Thomas Olver, the sureties, to bring the sum of 5,000*l.*, the amount of their bail, for general distribution; this monition was duly served in the month of August, and was returned on the 4th November. The act then alleged, that with a view to prevent further proceedings against him, Norway paid to Nicholls 400*l.*, on account of the prize, and to Crouch, a licensed agent, the sum of 145*l.* 6*s.* 6*d.* for his advances to different seamen — and that the sum so paid and received by Nicholls was not according to the tenor of monition, which directed all moneys to be paid into court. On the part of Nicholls it was alleged, that previous to the issuing of the monition against the bail, Norway applied by letter on the 18th October, 1816, for the proceedings to be suspended as against him, that he might discover Lukey and secure the property; that during the summer of 1817,

Nicholls had several interviews with Norway at Fowey [ \* 292 ] \* relative to the payment of the proceeds, when Norway informed him that he had settled in full with several of the officers and men for their shares; and at length he, Nicholls, was induced to accept 400*l.*, in lieu and satisfaction of his proportion, which Norway accordingly paid him, and he gave him an acquittance of all his share or interest in the proceeds; that the same was much less than his due proportion, and had no reference whatever to the interest or share of any other claimant; that Thomas Olver, the co-bail is still resident at Fowey, and considered to be in good circumstances, wherefore he prayed to be dismissed.

For the treasurer of the navy, the *King's Advocate* and *Arnold* — The sum received by Mr. Nicholls ought, in justice and equity, to be brought into the general account, as well as the other sums received by Crouch for several of the seamen. Supposing Lieut. Nicholls's share to be two eighths, it would have been little more than 500*l.*, even if there were no deductions. He has received 400*l.*, and this he has obtained by virtue of the process of this court, under which all sums were ordered to be paid into the registry.

*Lushington, contra.* Lieutenant Nicholls has done nothing contrary to common usage with regard to prize money; he got an advance (not nearly amounting to his portion) for his immediate wants. The monition should be directed against the bail; for though Mr. Norway is dead, there are his representatives; and it is not stated that he died insolvent; and the other bail is alive, who are sworn to be in good circumstances. Officers are never called upon to [ \* 293 ] refund their advances, \* till there is proof of the insolvency of the agent and sureties.

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## JUDGMENT.

**LORD STOWELL.** I certainly shall not dismiss Lieutenant Nicholls from any obligation he may be under in respect to these proceeds; but, in the first instance, the prize agent is liable; and if he cannot make the correspondent payments, his sureties are the next parties to be applied to, to the extent that their bonds have subjected them. These are reasons that induce the court to wait till it can ascertain if there be a deficiency on the part of those who are under prior obligations. If the agent himself has failed, the bail have engaged to make good his deficiencies. Generally speaking, the agents in this country are very respectable men; but the agent, in this case, does not appear to belong to that class. It was very improper in the captors to appoint a person in this man's situation, living at Fowey, a small Cornish borough and fishing town. They should have intrusted their interests to more substantial and honorable persons.

When the court is in full possession of the answer on the part of the bail, then will be the time to consider of the propriety of enforcing the monition that has issued against the actual captor. For the present, I content myself with ordering that a monition should go against the bail and against their representatives. But let it be perfectly understood that I do not release Lieutenant Nicholls.

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\*PRIZE COURT.

[ \* 294 ]

SUNDRY BOATS OR TRABACOLOS, captured in the Adriatic.

July 16, 1824.

Limited responsibility of a foreign prize agent who acted a fair part, and did every thing for the best, under the circumstances of the case.

THIS case was brought on by an act on petition, between the captors of the above-mentioned vessels, and the representatives of the late Sir Spiridion Foresti, of Corfu.

It appeared that, in the latter part of 1806 and beginning of 1807, H. M. S. *Unité*, Patrick Campbell, Esq., commander, while cruising in the Adriatic, took certain prizes, and an application was made to Sir Spiridion Foresti, then a diplomatic agent of Great Britain at Corfu, to act as prize agent. The vessels being too small to be sent to a Prize Court, were, together with their cargoes, necessarily con-



verted into money, and the proceeds lodged with him. At this juncture, Corfu was garrisoned by Russians; but, by a secret article of the treaty of Tilsit, Russia surrendered the Ionian Islands to France. Sir S. Foresti with difficulty made his escape in an open boat, coasting for 600 miles along a hostile shore, until he reached the Dardanelles, in order to give information of these events to Lord Collingwood. He could not take the prize money with him, and had he left it in any place of public deposit in Corfu, it would have been instantly confiscated on the arrival of the French. He therefore deposited it secretly with a Mr. Debiassi, the Danish consul, and a merchant of opulence and credit at Corfu, engaging to pay him a small percentage for the safe custody. Sir S. Foresti afterwards proceeded to [ \* 295 ] Malta, where he stated these facts to the captors, \* and different attempts were made by them, in conjunction with him, to procure a remittance of the money from Debiassi, but in vain, on account of the war. At the general peace of 1814, Sir S. Foresti returned to Corfu, and immediately attempted to recover the money from Debiassi. The latter acknowledged the deposit, but pleaded inability to pay at once. The matter was therefore referred to a court of arbitration, which determined that an indulgence should be given to him in point of time, owing to the political difficulties in which the island had been involved. Shortly after this, Sir S. Foresti was summoned to England, where his public services were rewarded by the honor of knighthood, and a pension.

On 11th of February, 1817, a monition was extracted by the captors in the High Court of Admiralty, calling upon Sir Spiridion Foresti to account for the money in question. He appeared, and stated the above circumstances, promising at the same time to use further exertions to enforce payment from Debiassi, on his return to Corfu. This answer was deemed satisfactory, and he acted according to his promise. He found, however, that in his absence Debiassi had availed himself of a commercial law of the country, to assign over to a public receiver certain old houses in discharge of the debt. A long course of litigation ensued, Sir S. Foresti as agent of the captors, endeavoring to compel Debiassi to pay it in money. Whilst the matter was still pending, Sir S. Foresti, on the 19th of March, 1822, died; whereupon the captors, eight days after his death, brought an action against his widow and son, and obtained judgment in the Commercial Court of Corfu, decreeing them to pay (without any [ \* 296 ] reference \* to the large advances that had been made, as usual, to the captors) the whole sum originally intrusted to Sir S. Foresti, with ten per cent. interest from 1814.

*Adams* and *Stoddart* now contended, that, Sir Spiridion Foresti, having done the best that could be done for the captors in 1807, and actually preserved great part of their property from French confiscation, was entitled to be borne perfectly harmless; that, this being a prize proceeding, the property actually condemned as prize in the High Court of Admiralty in 1817, and Sir Spiridion having been held before that court as a prize agent, to the day of his death, his representatives were entitled to the protection which this court always extends to prize agents when they conscientiously discharge their duty.

On the part of the captors, the *King's Advocate* and *Lushington* submitted, that the court at Corfu was competent to determine the question which it had decided; and that, among other grounds, it had gone upon a guaranty of *Debiasi's* respectability, which Sir Spiridion Foresti had given to the captors at Malta, in 1810; and the captors, being satisfied with the decree at Corfu, were not disposed to proceed further in the High Court of Admiralty. They however intimated that they had offered fair terms of compromise; and they now had no other prayer to make but that the monition may be allowed to expire.

On the other side, it was denied that the document amounted to a guaranty of the debt due from *Debiasi*, and contended that, even if it did, it was a *nudum pactum* given without any consideration, and therefore void; and they urged that the captors were not entitled to be dismissed, but \*were bound, in strictness of [\*297] law, to bring into the registry the property which they had obtained at Corfu as prize proceeds, in order that it might be dealt with as this court should direct, according to the ordinary rules of this court in matters of prize agency.

The COURT observed,—I cannot find it is denied that Sir Spiridion Foresti performed his duty to the captors with great fidelity, in circumstances of a very trying and difficult nature. It is clear that he did every thing which was proper and just for the benefit of the parties as far as he could, in the hazardous state of public events. I am therefore anxious to give protection to this gentleman, who appears to have acted with perfect propriety as a prize-agent,—with due attention to the interest of his principals, and with unimpeachable honesty. Under such circumstances, this court would certainly not be inclined to hold him liable beyond the amount recovered from *Debiasi*. If the captors have taken a guarantee from him for any thing more, they have done what I think they should not have done.

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The Flora. 1 Hagg.

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In my opinion, however, this guarantee in a court of prize would make no difference whatever; and though I cannot set aside the proceedings at Corfu, I have no hesitation in saying, that I should have acted otherwise.

I shall not hold Mr. Foresti bound beyond the value of the houses recovered from this Debiassi. But the court hopes, that this cause may come to an amicable and honorable termination.<sup>1</sup> I will give this Mr. Foresti every protection in my power.

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[ \* 298 ]

\* FLORA, Findlay.

November 18, 1824.

Upon the sale of a ship, in a suit for wages, by admiralty process issuing after the seizure of the same vessel by the sheriff under a writ of *feri facias*: held, that the claim of the sheriff to the surplus proceeds, in discharge of his execution, was good as against the late owner of the ship.

JOHN WHITFIELD, whilst sole owner of a brig called The Flora, having fallen into embarrassed circumstances, became indebted to a person of the name of Roberts, who, on the 2d of February, 1822, accepted four bills of exchange, at three, six, nine, and twelve months after date, for 125*l.* each, drawn on him and his partner, by J. W. It appeared, that as a security for the repayment of the amount of these bills, J. W. executed a warrant of attorney to confess judgment for 1,000*l.* in the Court of King's Bench, and on the 16th of December, 1822, judgment was entered up, on the warrant, and a writ of *feri facias* was issued, addressed to the sheriff of the county of Kent, directing him to levy for the sum of 375*l.*, being the amount of three of the bills of exchange, which had alone become due, and had been paid. Accordingly, on the 17th of December, the brig Flora, then lying in the River Thames, at Deptford, in the county of Kent, was arrested at the suit of the judgment creditor. While the ship was in the custody of the sheriff, she was arrested on the 18th January, 1823, by the Deputy-Marshal of the High Court of Admiralty, acting under a warrant issued from that court, in a suit of wages instituted by the

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<sup>1</sup> The parties acted upon this recommendation, and the matter was accommodated out of court.

mate and four of the mariners, against the above-mentioned vessel. Upon the execution of the admiralty process, there seemed to be an understanding that the vessel should remain in the actual custody and personal possession of the sheriff's officer, and she continued warped and \*moored, alongside a wharf at Deptford, [ \* 299 ] (upon the payment of one shilling a day to the wharfinger,) till the night of the 13th of April, when in consequence of the information of the master, (Findlay,) that the person who was acting for the sheriff's officer had quitted the ship on that afternoon, (as it was admitted in the affidavits he occasionally did for short periods) without leaving any person in possession,<sup>1</sup> Whitfield sent his son to Deptford, who, as soon as the brig floated on the return of the tide, proceeded about ten o'clock the same evening with the vessel from Deptford, and anchored her at three o'clock the following morning near the Lower Pool, on the north side of the river, in the county of Middlesex. On the same morning the sheriff's officer being informed that the vessel had been removed, traced her, and in the course of the forenoon regained possession, weighed her anchor, and restored her to her former position at Deptford, where she continued in his custody till the 30th of April, when she was delivered up to the purchaser, under a decree of sale from the Court of Admiralty. The ship was sold on the 23d of that month, and the proceeds remaining in the Admiralty \* registry, after deducting the [ \* 300 ] wages and costs, amounted to the sum of 277*l.* 15*s.*

On the 17th of June, 1823, the judgment creditor petitioned the Court of Admiralty to decree the balance of proceeds to be paid out to him. The late owner (Whitfield) protested against the issuing of this decree,<sup>2</sup> upon which the matter was directed to stand over. He

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<sup>1</sup> In an affidavit made by Mr. Shelton, (Roberts's attorney,) it was stated, that he was apprehensive lest a commission of bankruptcy might defeat the execution of the writ of *fi. fa.*: and that being unable to procure the register of the brig from Whitfield, he preferred it being sold by the Marshal of the Admiralty rather than by the sheriff, conceiving, under all the circumstances, that it would sell for more money, and thereby benefit all the parties interested, and that Roberts would be entitled to, and have no difficulty in obtaining, the surplus proceeds of the sale; that he did not mean or intend to abandon the said execution, but on the contrary, directed the sheriff's officer to retain possession of the brig until it was sold.

<sup>2</sup> The protest, in substance, stated, that the sheriff should have caused the admiralty proceedings to be stayed, and have assured the seamen that their wages would be paid; that the sheriff having allowed the admiralty officer to take possession, the proceeds could not be followed into a court which had no jurisdiction to inquire into the debt—that in truth the admiralty was the higher jurisdiction, and when it took possession the sheriff was ousted, and had no choice but to abandon, or pay the demands of the ad-

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The Flora. 1 Hagg.

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was subsequently admitted to sue in *formâ pauperis*; and the money was ordered to be invested in exchequer bills.

On the 5th of February, 1824, upon the motion of Mr. Bolland, a rule *nisi* was granted by the Court of King's Bench, upon notice to be given to Whitfield, to "show cause why the Marshal of the High Court of Admiralty, or his deputy, should not pay over to the plaintiff, or the sheriff of the county of Kent, a sum of 275*l.*, being the surplus proceeds of the brig Flora, taken in execution by the sheriff of the county of Kent, by virtue of the writ of *fiери facias*, [ \*301 ] issued in this cause." On the \*12th, cause having been shown by the defendant in person against the rule, the same was discharged.<sup>1</sup>

The matter then reverted to the Court of Admiralty, and on the 25th of February, the judge of that court decreed the surplus proceeds to be paid out to John Whitfield, late sole owner of the ship.

From this decree an appeal was prosecuted in the Court of Delegates.

The respondent again prayed to proceed in *formâ pauperis*, when the con-delegates having administered to him the usual oath, assigned him (upon their own consent) the same proctor and counsel that had appeared for him in the Court of Admiralty. On the 18th of November, the cause came on for hearing.<sup>2</sup> For the respondent, *Haggard* relied upon the following positions:— That the proceeds of a ship sold under a decree of the Court of Admiralty, by a competent officer of that court, are subject to the directions of the judge

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miralty; that the vessel was sold by the admiralty officer with the consent of Roberts's attorney, on an understanding that the balance should be paid to him; but it was submitted that such consent was not at all necessary, and that such understandings were pregnant with the most mischievous consequences. It was further stated that the sheriff's officer being actually out of possession when the ship was moved up the river, the recaption was illegal.

<sup>1</sup> At the Court of Delegates, Mr. Justice Holroyd said, that not being present when the rule was discharged, he had inquired of the Lord Chief Justice and Mr. Justice Bayley respecting it, and they informed him, that the application failed because they thought the Court of King's Bench had no jurisdiction to proceed in such a summary manner against the officer of the admiralty, who had acted under competent authority, and consequently it was useless to make an order upon a person who would not be bound to obey it.

<sup>2</sup> The following judges sat under this commission:—

Mr. Justice HOLROYD,  
Mr. Justice BURROUGH,  
Mr. Baron GARROW,  
Dr. ARNOLD,

Dr. STODDART,  
Dr. PHILLIMORE, and  
Dr. LUSHINGTON.

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The Flora. 1 Hagg.

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alone under whose decree the sale is effected ; and are to be regulated \*by its own established practice and rules. That, [ \*302 ] by the usage of the Court of Admiralty, a general creditor is not entitled to sue in that court for proceeds, and that the exceptions to this rule, if any, are to be supported by the party making the claim, and that, in no instance, does it admit of an exception, when the vessel and owner are both English, and when the owner is solvent and in this country, and more especially when there are disputed accounts, resting upon contradictory affidavits, between the parties. That the circumstance of a priority of possession by the sheriff had ceased to operate in favor of his lien, inasmuch as there was an abandonment of possession, when the vessel was, quietly and without opposition, taken out of his jurisdiction, by her removal into Middlesex ; and that having once abandoned possession, he had no power to resume it, in a different county, under the same writ. And further, that the acquiescence of these parties in the admiralty sale under the second execution, (when all persons are called upon to offer objection, if they have any,) without interposing any claim pending the proceedings, amounted to a waiver and relinquishment of their previous title ; and there being no failure of justice to the creditor, he was not now entitled to be so assisted as to put him in a better situation than others to whom the party might be equally indebted. The John, Jackson, 3 Robinson, 290 ; Ladbroke v. Crickett, 2 T. R. 649 ; Ackland v. Paynter, 8 Price, 100.

For the appellants, *Jenner*, LL. D., and *Bolland*.

The decree in the Court of Admiralty was only given *pro formâ*, in order that the cause might be brought up to this court, for the opinion of the \*common-law judges, particularly on [ \*303 ] the question of abandonment. They admitted that a general creditor, merely as such, cannot sue in the admiralty ; but that admission did not bar the sheriff in possession under the king's writ. *Viner's Abridgment*, tit. Execution (B. a.) 1. The sheriff's possession was merely suspended by the admiralty process ; and as to the alleged abandonment of possession, it is not borne out by the affidavits.

The court stopped the counsel, and observed, that it was clear there had been no actual abandonment. A short absence for necessary refreshment, leaving the vessel fastened to a wharf, and paying a rent for that privilege, was not an abandonment. Then, the sheriff being legally in possession in Kent, had a right to follow his possession into another county ; and although the Court of Admiralty cannot enter

into the contracts of general creditors, yet it may be bound to take a judgment on record as a debt. The sheriff, in this case, may have yielded to a prior claim; but he continued his right as against the owner, whatever might have been the effect of an abandonment in favor of another judgment creditor. The owner here alleges that there was no adequate consideration for the original debt. If the proceeds are paid over to the sheriff, the owner may apply to the Court of King's Bench to reduce the debt on record, but that is a matter which cannot be examined here. The learned judges, therefore, decreed a monition for the transmission of the balance of the proceeds, in order that they might be paid out to the late high sheriff for the county of Kent.

[ \* 304 ] \* Afterwards Mr. Whitfield made an application in person to the Lord Chancellor for a commission of review, on the ground that the Court of Delegates had decided against him in the absence of certain documents which might have induced a different conclusion. The application was resisted by *Dr. Jenner* and *Mr. Bolland*. They adverted to the cases of *Matthews v. Warner*, 4 Ves. 194, and of *Eagleton & Coventry v. Kingston*, 8 Ves. 438, and observed that there was not the slightest pretence for the present application. It was, therefore, unnecessary to argue any question relative to the decision of the Court of Delegates being conclusive and final in cases of a civil and maritime nature.<sup>1</sup>

June 4th, 1825. The Lord Chancellor said he was very much struck by the novelty of the application. He begged, however, that it might be understood that he gave no opinion whatever upon the subject of jurisdiction. If his Majesty had the prerogative of granting a commission of review in maritime cases, it was his duty to take care that it be preserved. But the duty now imposed upon him was to advise the crown, whether the decision of the Court of Delegates was right or wrong; and, therefore, the party was not entitled to have his cause heard upon one state of facts before that tribunal, and upon another state of facts before him. He concluded by stating that, upon a consideration of this case, in all its circumstances, he could not advise the crown to grant a commission of review.<sup>2</sup>

<sup>1</sup> See 8 Eliz. c. 5; 25 Hen. 8, c. 19, s. 4, also a letter of Sir Leoline Jenkins, (while judge of the High Court of Admiralty) to the lord-keeper Bridgman, in Wynne's Life of Jenkins, p. 721.

<sup>2</sup> *Ex relatione*.

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The Lady Banks. 1 Hagg.

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## \* PRIZE COURT.

[ \* 305 ]

NAME UNKNOWN, AND TWO OTHERS.

November 30, 1824.

A monition decreed against an agent at St. Kitt's in respect to the proceeds of a revenue seizure.

THREE vessels were seized by H. M. S. Falmouth, commanded by Captain Purcell, and carried to the island of St. Christopher, and there condemned.

On behalf of the treasurer of his Majesty's navy, and upon an affidavit made by *Mr. Hancock*, the *King's Advocate* and *Arnold* (referring to 49 Geo. III. c. 123, s. 31, and 54 Geo. III. c. 93, s. 7,) moved for the decree of a monition against James Berridge, of the island of St. Christopher, agent for the captors, to bring in the sum of 648*l.*, part of the proceeds of the three vessels and cargoes remaining in his possession undistributed, together with a detailed account of the proceeds, and all the vouchers (properly authenticated on oath) connected with the transaction; and also attested copies of the prize-lists, on which any former distribution may have been made; and further to appear and show cause why he should not pay interest at the rate of 1 per cent. per month, from the period when the distribution may be proved to have been unjustly withheld from the captors.

Motion granted.

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\* LADY BANKS, VALLANCE.

[ \* 306 ]

November 30, 1824.

Proceeds of a ship and cargo sold abroad, and transmitted to the admiralty registry of England — payment decreed.

THIS was an application to the court to direct the sum of 8,109*l.* 6*s.*, (being the amount of certain proceeds arising from the sale of this ship and cargo at the Mauritius,) which had been transmitted to the registry of the High Court of Admiralty, and the interest thereon, to be paid out to the respective consignees of the cargo.

*Lushington* stated, that upon some disputed claims in the Isle of



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France, the vice-admiralty judge there had been petitioned by the registrar of the court to make an order for the transmission of this money to the admiralty registry in this country for the sake of security; he now moved, on an affidavit of consent on the part of the purchaser of the cargo, that the proceeds should be paid out to the consignees.<sup>1</sup>

Motion granted.

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APOLLO, Tennant.

November 23, 1824.

The Court of Admiralty has authority to arrest and detain a ship, upon the application of a part-owner, who dissents from her intended employment, until security be given by the other part-owners to the full value of his share. Objections to the immediate payment of the entire amount of the stipulation, upon the loss of the ship, overruled.

The bail-bond looks only to the safe return of the ship, or to the payment of the stipulated sum.

In August, 1821, Charles Bryan Tarbutt, the owner of three eighth parts of the ship *The Apollo*, caused her to be arrested to restrain her from proceeding on a voyage to which he dissented, [ \* 307 ] \* until bail should be given to the amount of his share, for the safe return of the ship to the port of London.<sup>2</sup> William Tennant and John Nesbitt, the owners of the remaining five eighths, produced two sureties, who, submitting themselves to the jurisdiction of the High Court of Admiralty, bound themselves, their heirs, executors, &c., in the sum of 3,000*l.* to answer the said action; and, on 23d of August, the ship was accordingly released. On the 12th of November following, Tarbutt filed a bill in the High Court of Chancery, and on the 17th obtained an injunction, restraining his co-owners "from navigating, sending, chartering, or freighting the said ship from the port of London, to any other port or any voyage whatsoever; and also from contracting any debts, or entering into any engagements or liabilities whatsoever, as owners of the said ship." He also prayed, that his co-owners should indemnify him from all the legal liabilities which might attach to him as one of her registered owners. An answer was put in, and, on the 23d of November, the injunction was dissolved. The ship ultimately sailed, and was lost

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<sup>1</sup> See *Morris v. Robinson*, 3 Barn. & Cress. 196.

<sup>2</sup> See *The Partridge*, Betham, p. 82.

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on her return home, on the 16th of April, 1823. On the 4th of November, in the same year, a monition issued, at the instance of Mr. Tarbutt, against his co-owners and their sureties, to pay into the registry for his use, the sum of 3,000*l.*, being the value of his three eighths, or to show cause to the contrary. An appearance was given for the owners of the remaining shares, and the amount of bail was brought in subject to the order of the court; inasmuch as they objected to the payment of the \* money according to [ \* 308 ] the tenor of the monition, and prayed "that the registrar and merchants might be directed to inquire what loss, costs, damages, salvage, demurrage, and expenses had been paid and incurred by them, in consequence of Tarbutt's interference in the concerns of the ship, and of his having, by the injunction by him obtained, prevented her proceeding to sea, and to report the amount thereof; and that such amount may be deducted from the 3,000*l.*, the sum remaining in the registry, and be paid out for their use and benefit." The cause was argued upon the facts set forth in an act on petition, supported by affidavits on both sides.

*Lushington* and *Dodson*, in objection to the further execution of the monition, argued upon three points: 1st. That Tarbutt, when the ship was released in 1821 upon bail to answer his interest, had disobeyed the order of the court in not giving up the sails; instead of which, he paid no attention to the process of the court directing him to deliver them up, till he was threatened with an attachment. [COURT. He ought, undoubtedly, at least to have given an appearance to the monition.] But he disregarded the authority which he would now adopt. 2d. That without any cause whatever, he obtained an *ex parte* injunction against his co-owners, without setting forth in his bill that any proceedings had taken place in the Court of Admiralty to secure his interest in the ship. 3d. That he circulated false and malicious reports with regard to the state of the vessel, to the prejudice of the ship, and loss of the co-owners, to the amount of 5000*l.* They admitted that the chief question on the merits of the case, was, whether the ship was or was not seaworthy; and they contended \* that Tarbutt had grossly and wilfully mis- [ \* 309 ] represented her condition.

With regard to the power of the court to give redress, they referred to its extent of jurisdiction in the terms of the commission of appointment, and submitted, that the court had full power to determine upon all matters, civil and maritime, between owners and proprietors of ships, and could exercise a discretionary power upon the recognizances which it was empowered to take. "It rests, then, with the

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opposite party to show a want of jurisdiction, and to point out that a jurisdiction exists elsewhere. If it be said that the application is novel, the answer is, that the novelty of the case arises from the novel proceeding of the other party; this being the first instance in which a part-owner has not been content with the security he has obtained in this court, without resorting to the aid of another jurisdiction for the same purpose."

*Jenner and J. Addams, contra.* The jurisdiction of the court is extremely limited with respect to the disputes of part-owners. [COURT. There is no doubt that the commission has been much narrowed by construction.] It is not, then, enough to say that other courts have no jurisdiction; but it belongs to the party making an application, in a case admitted to be without any precedent, to show, that the Court of Admiralty has jurisdiction. It is true, that the sails were not delivered up in the first instance; because our party dissented from the voyage, and he afterwards kept them till the effect of the application to the Court of Chancery was known. The proceedings in this court were not noticed in the bill, from their being irrelevant; but [ \*310 ] the Lord Chancellor was \*perfectly aware of the nature of them, as they were much commented upon in argument. The decision in that court was, that the ship was seaworthy. Here the inquiry is, whether she was seaworthy above all suspicion of doubt, so as to make the charge referable to maliciousness. The application to the Court of Chancery was for protection against all legal liabilities which would attach to him as a registered owner; the security in this court was against the loss of the ship, but it did not indemnify him in any other respect. The charge of special damage arising from malicious motives is totally unfounded; it must be proved by the party assigning it; nor is it competent for this court to try an action of slander, any more than it can direct the registrar to estimate the damages, supposing any to have been caused. Mr. Tarbutt is entitled to the full amount of the security, and to the enforcement of the motion.

#### JUDGMENT.

**LORD STOWELL.** This suit was commenced by Charles Bryan Tarbutt, in the month of August, 1821, against William Tennant and George Nesbitt, owners of five eighths of the ship Apollo, upon her intended voyage to the East Indies, which voyage he dissented to, calling upon them to give security for the safe return of the ship, or for the estimated value of his share, being three eighths, which estimated value was 3000*l*. Various proceedings have taken place;

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but security was given, and the estimated value has been brought in, upon proof being given that the ship had been lost off the Cape of Good Hope. The party Tarbutt prays that the money may be paid over to him, which has been resisted upon various grounds, stated in an act on \*petition, and supported by various affi- [ \*311 ] davits, which are opposed by contradictory statements and affidavits. The court has to inquire into two questions ; one, respecting its jurisdiction and legal ability to retain such a cause ; and the other, if it is satisfied of that jurisdiction and legal ability, whether the facts when proved, lead to any conclusion which the court can safely form.

The counsel, in arguing the case on the part of the persons who pray the court to proceed in these inquiries, have deemed it convenient to enter first into the question of facts, and then subsequently proceed into the question of jurisdiction. The court finds it necessary to alter that arrangement, and to consider, in the first place, the question of jurisdiction. The facts must, undoubtedly, first be stated sufficiently to raise that question of jurisdiction by showing their nature generally ; but the court will not proceed to examine the facts in the way that would become necessary to produce any legal conclusion upon them, unless it is first satisfied that it has legal power to retain them for the purpose of establishing their legal effect ; if it is not so satisfied, it will dismiss an inquiry which can lead to no active conclusion.

Upon the question of jurisdiction, it is not unimportant to observe, that the court has repeatedly gone the length of taking these stipulations in favor of a dissentient copartner, and upon his application that a security may be given for the safe return of the vessel upon the voyage to which he dissents, or otherwise, for the estimated value of his own share.<sup>1</sup> This practice has in some earlier \* instances been subject to some doubts ; but it has entirely [ \*312 ] survived those doubts, and it has been formally recognized by the courts of common law, and forcibly recommended by the emphatical expressions alluded to, "that ships were made to plough the ocean, and not to rot by the wall." There is no doubt, therefore, of the legality of the initiatory measure here taken of compelling such security to be given. The court, in this operation, is not merely ministerial, for it compels the party authoritatively to find the security ; it likewise, in the usual termination, compels the party to pay the sums stipulated in the bond given for the security. The bail-

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<sup>1</sup> See Abbott, p. l. c. 3, s. 4. Holt, p. 202, 2d ed.

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bond contemplates no other object than the safe return of the vessel, or, in default thereof, the payment of the stipulated sum. That is the whole extent of the transaction upon which the parties and the court are acting in this process. No other object is proposed, and there is no case, either within the scope of my own inquiry, or which has been discovered by the diligence of the advocates, upon repeated challenges given them for that purpose, in which the court has moved beyond those limits. What is now proposed must, therefore, be considered as a novel enterprise recommended to the court without any support from former usage, and to be taken up upon new and unprecedented views of the subject.

It has been said, that the commission or patent of the Judge of the Admiralty authorizes such an assumption; and the words of that commission might countenance such an attempt; but it is universally known, that a great part of the powers given by the terms of that commission are totally inoperative, and that its active jurisdiction [ \* 313 ] stands in need of the support of continued exercise and usage. It has been said, that no cases occur in which other courts have interfered to restrain such a movement. On the part of the Court of Admiralty, such an argument would be entitled to grave consideration, if it could be shown that that court had ever made such a movement, so as to furnish a ground for the interference of any other court; and that this court had proceeded so far without being interrupted. The argument then might have considerable weight; but if no case can be shown to have ever existed in which the determined hostility of the adverse parties has ever invoked and obtained the aid of the court for such a purpose, the first and most natural conclusion is, that this court has never by any proceedings of that kind, furnished occasion for such an interruption. It has kept within its known limits, and on that account alone has not been impeded.

It has been said, that other courts exercise a salutary authority over their own recognizances, so as to make them square with the exact justice between the parties. But even taking that these stipulations could with propriety be considered as recognizances, it is to be remembered that those courts, in this process of distributive justice between the parties, only exercise an authority which they possess over the general subject. But in this court no man would presume to say that it possessed a general jurisdiction to such an extent. A copartner could not originate a suit for accounts in this court; and if it could not originate, how could it assume a jurisdiction to do so merely because there was a stipulation existing in the court, pointing to different transactions, and in its terms

and \* meaning pointing exclusively to a remedy for that object of complaint only. What is the nature of the bail-bond or stipulation given in this cause? It looks, as I have observed, only to the event of the loss of the ship, and to the payment of the estimated value (in that case) to the part-owner. It would be a very singular way of considering this subject, if it could be contended that though this court possessed no jurisdiction to entertain a suit of accounts originally, yet it could hang a jurisdiction, useful and effective to this purpose, upon the peg of a stipulation which never contemplated any such matter, but looked only, in the intention and meaning of the parties, to the single consideration of a remedy for the loss of the ship.

If it is said that the court is deficient in doing justice, it is to be remembered that the court has administered all the justice which the parties have looked for and provided to obtain in their original contract, and in their application to its authority. I am satisfied whoever considers the terms of the bail-bond must acquiesce in the conclusion, that it is strictly confined to the event of the loss of the vessel; and, therefore, I think the only case in which it is possible to conceive that a party accepting such a stipulation would forfeit the whole, or part of the estimated sum, would be a case in which he stood charged with having actually and efficiently contributed to that loss somehow or other. But in that case the court might possibly be induced to wait till the truth of the charge was investigated by a competent court, and such a court must possess the power of inquiring into a transaction partaking most strongly of a criminal nature, by the use of a compulsory process for the \* attend- [ \* 315 ] ance of witnesses, and the test of a cross-examination applied to their testimony. In the present case the gentlemen have resorted to a mode of proceeding totally destitute of these advantages, and which they most assuredly would not have done in a case imputing malice and hostility, if they could have possibly resorted to the regular mode of plea and proof; for they could not reasonably expect, that the court would presume to decide upon charges of such a nature upon mere voluntary affidavits, brought in on both sides by persons who chose to furnish them, without any liability to cross-examination. It affords no mean argument against the existence of such a jurisdiction, that it must resort to such an insufficient process; and it therefore proves its own failure in the practice as well as in the principle. Upon the whole, I am of opinion that I must keep within the known limits; and no sense of judicial duties, which I have ever entertained, has led me to suppose that *ampliare jurisdictionem* by private authority be one of those duties.

I come now to observe upon the facts, and rather with a view to the satisfaction of the parties and their counsel, than with any intention of considering their legal effect; for if I am right in the opinion I have signified, the court cannot pronounce for their legal effect, having no jurisdiction for that purpose. I have already said, that if there were causes immediately pointing to the loss of the vessel, and actually bearing upon it, and they were urged with an appearance of sincerity, the court might possibly be induced to wait till an examination had taken place in the proper forum; but they do not [ \* 316 ] appear to me to be entitled to any \* such degree of deliberate respect, being some foreign to the real question, others lying entirely out of the jurisdiction, and others perfectly out of both.

It appears that Mr. Tarbutt, who had been the former captain of the ship in several voyages to the East Indies, and afterwards was the managing owner, was deposed from the management of its concerns. The acting owners had likewise deposed the succeeding captain, and substituted another in his stead, to whose ignorance and incapacity the loss of this vessel has been attributed by the verdict in a jury of this country. It is probable enough that these removals, being rather of the nature of discourtesies and disobligation, might create some degree of irritation in the mind of the copartner; as it is, I suppose, no very unfrequent case that such differences do not produce any friendly sympathies amongst them; but the true question is, how far any irritation in his mind has contributed to the unfortunate event of the loss of the vessel, by any act to which it has given birth. It is charged upon him, that, after having taken the protecting step which he had resorted to in this court, he did apply to the Court of Chancery for an injunction to prevent her going to sea at all, suppressing the mention of the security he had taken for the value of his share in the Court of Admiralty. If this produced any material delay contributing to the loss of the ship, it might be worthy of some consideration somewhere; but if it produced no such material delay, it could not be taken into the account here; and it was only a caution, justified by reasonable motives, in order to protect him- [ \* 317 ] self from \* any liabilities for the expenses of repairs and improvements in the ship which he disapproved; and the caution was the more necessary, if it be true, as asserted by the other parties in the case, that, after having taken the stipulation in the admiralty, he had no right whatever to control any expenditure which they might think proper to make under pretence of being necessary for the prosecution of this voyage. The Court of Chancery could not discharge him from his liability as an owner, but discharged him

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The Apollo. 1 Hagg.

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from any censure on his application thereupon, though a full communication of the proceedings already had in this court had not been made by him in the bill which he had filed for the injunction. And the delay occasioned was not such as could contribute to the unfortunate event, which happened at a remote distance, both of time and place, in a part of the globe subject to the most formidable storms, aided in this case, in their ruinous operations, by the ignorance and incapacity of their captain. The detention of the sails was certainly less warrantable, but is subject to the same observation of having produced no mischievous delay.

Loud complaints are made of the injury done to the acting owners, by the false and scandalous representations given by this Mr. Tarbutt, of the insufficient state of the ship for the voyage she was undertaking, thereby deterring numerous passengers and freighters. A vast mass of contradictory evidence is collected; but, being exhibited in the form of voluntary affidavits, the court, without withholding the respect that is certainly due to several individuals on both sides, does not find itself justified in pronouncing for any result therefrom. \* If such reports were insincere and malign, the party has an undoubted title to a reparation for such an injury done, in the proper court, upon a proper application; but it is not examinable here, and I must again observe that it stands totally detached from any connection with the event alone contemplated in the bond. I have passed by other similar objections on the same grounds, some of which objections, as I have observed, lie out of the question, others out of the jurisdiction, and others out of both. I therefore dismiss them without any special observations.

I have observed, likewise, that the charges should be of a serious nature, wearing a character of sincerity on the part of those who brought them forward, and pursued them with an uniformity of statement which is one of the principal tests of that sincerity. Now, I cannot but remark, that the beginning and the conclusion of the statements wear as different aspects as it is possible (for statements made by the same individuals) to present. It is evident that every fact of which they now complain were in their possession and knowledge before the ship quitted England, and they might then have alleged that the other party defeated their own claims by their misconduct. But nothing of this transpires. On the contrary, long after the ship was known to be lost, and long after payment of the forfeited money was demanded, and the pressure for it repeated, all is acquiescence on their part, and submission to the demand; nothing required but some accommodation in the time of payment, and the request for that purpose couched in the most civil and inoffensive



terms. It is not till almost the conclusion of the proceedings in this court that the language assumes a very hostile tone. They then turned the tables completely upon their opponent Tarbutt, and instead of finding him, as before, a creditor upon them for 3,000*l.*, they find him a debtor to them for damage done to the amount of 5,000*l.* I think it is impossible to say that this is not an after-thought, a plea merely dilatory, resembling the alleged practice of insurers, in being much more expert in finding excuses for delay than in finding money for payment. If I were unfortunately compelled to form a judgment upon these transactions, this total inconsistency in the conduct of the parties would alone be sufficient to determine my judgment. I pronounce, without hesitation, for the immediate payment of the money which has been so long and improperly withheld.

I have now only to pronounce upon the matter of costs, and I pronounce for costs as generally due to Mr. Tarbutt, but subject to the exception of any costs incurred for matter unnecessarily introduced by himself. I think if Mr. Tarbutt chooses to lead up an irregular dance, he cannot expect to be paid for the steps he chooses to take in it. He is justly chargeable with being first to start a portion of that redundant and impertinent matter which has found its way into many parts of this act; for what possible purpose could it serve to state that the manner, in which the opposite parties had become, a considerable time before, the owners of the five eighths, was by indirect and disguised means, when he had, without any objection whatever taken to their title, admitted them as joint owners, acted with them as such, and in this very proceeding called upon them as the [ \* 320 ] acknowledged owners of five eighths, and to answer to his claims in that character? This irrelevant matter is supported by affidavits, and is, of course, encountered by a contradictory statement, supported in a similar manner. I direct the registrar to allow no costs whatever for these or any other irrelevant statements and affidavits introduced by Mr. Tarbutt; and if he entertains doubts concerning the irrelevancy of any such statements and affidavits, that he will apply to the court for a solution of those doubts; and I will add that, finding the extreme inconvenience of introducing such redundant matter into acts of this kind, I shall at least adopt the same rule with respect to costs, in every subsequent case where I observe the same undue liberty has been taken.

Payment decreed without reserve.

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The Zodiac. 1 Hagg.

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## ZODIAC, Scott. •

January 21, 1825.

A bottomry bond, reciting "that the outward freight was insufficient to pay the just charges of the British consul, and the necessary disbursements on the vessel;" and which bond was proved to have been given for a loan of money in great part required for the payment of the consul's commission, upheld. Whether the consul himself could have taken the bond, *quære*. On a report as to certain deductions, a rate of interest at fourteen per cent. sustained.

THIS was the case of a bottomry bond, given for money advanced on account of the above-named British ship, while at Boston, in North America, to pay various demands, which principally consisted of fees and commission charged by the British consul at that place. The act on petition stated that, in the course of a voyage from Bristol to Boston, with a cargo on freight, this vessel was \*much damaged; that she lost her captain at sea, and that, [ \* 321 ] upon her arrival in America, there was no legal representative, or other person authorized on his behalf, to take charge of the brig, or to receive the freight that was due, or to adjust the ship's accounts; that Mr. Manners, the British consul at Boston, with the concurrence of the mate, undertook the management of the concerns, so as to prevent letters of administration to the late master being taken out at Boston, and a sale of the vessel by public auction, as well as a settlement of the accounts according to the laws of Massachusetts, whereby great loss and expense might be incurred; that he applied the balance of the outward freight, as far as it would go, in payment of wages, repairs, and revictualling the ship — hired a crew, and appointed William Scott, a British subject, to be master; that in order to enable the brig to make a voyage to New Brunswick, and thence to Great Britain, the master obtained from a Mr. Aldersey the sum of 271*l.* 10*s.* upon a bottomry bond with maritime interest of fourteen per cent., payable within twenty days after the ship's safe arrival in Great Britain; but if the bond should be discharged within ten days after her arrival at New Brunswick, the maritime interest was to be reduced to seven per cent.<sup>1</sup> It further stated, that the

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<sup>1</sup> The averments that have been recited were enumerated in the bottomry bond. The master bound himself, &c., and the freight and earnings of the vessel. His signature was attested by two witnesses, and the consul certified that the master acknowledged the execution of the bond as his own full act, and that the money was advanced to enable him to pay for repairs, provisions, pilotage, port and other charges necessary to be defrayed.

[ \* 322 ] consul \* attended the vessel to New Brunswick, and that by his means a full cargo on freight was procured, amounting to 1,283*l.* 8*s.* On the other hand, it was alleged, that all expenses and demands at Boston were satisfied by the outward freight, save a balance of 26*l.*, which could easily have been raised by a note of hand; and that Aldersey, when he advanced the money on bond, knew that it was only wanted to pay the consul a commission of five per cent. upon the value of the ship (on an estimate of 4,000*l.*) in addition to his fee of twenty-five dollars; that what he did belonged to his capacity of consul, the repairs having been undertaken by Mr. Winslow, the consignee of the cargo. In reply, the privity of Aldersey was denied, and it was further stated that the master informed the consignee of the necessity of taking up money on a bottomry-bond, who declined to accept the offer of it.

On the 16th July, 1824, the court pronounced for the validity of the bond, and observed — that none of the objections seemed to look to Mr. Aldersey, by whom the money was advanced; there was no appearance of fraud at all connected with the party principally interested; and the predominant idea in the mind of the court, was, that the conduct of a third party could not affect the validity of the instrument. “If there have been any extravagant charges, and the demands were improvidently paid, they must be sobered down. But the consul had clearly a right to choose his own security, provided he took that to which he was entitled. The court, therefore, reserves the question of costs, that it may see how far the charges are consistent with the usual allowances in America, and whether any and [ \* 323 ] what deductions \* are fit to be made as against the holder of the bond.”

On the 30th of November, the report of the registrar and merchants was argued, with the permission of the court, upon motion, on account of the smallness of the sum.<sup>1</sup>

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<sup>1</sup> The report disallowed the consul's commission of \$947, and it substituted \$150 for his extra trouble owing to the death of the captain. It also stated, that the registrar and merchants did not consider the clause in the table of fees allowing five per cent “for the preservation and management of the property of British subjects dying intestate in the United States,” \* as applicable. The consular fees were held to be included in the accounts of the consignee (Winslow.) The maritime interest was also reduced to ten per cent.

\* This table was obtained from the office of Secretary of State for Foreign Affairs, and is

In objection to the report, the *King's Advocate* and *Adams*. *Prima facie*, a loan of money under the sanction of the consul of the country to which the ship belongs, is an open and fair transaction; it was advanced with the knowledge of the consignee, and for purposes justified by the laws of the United States. The report says correctly, that the clause in the table of fees does not apply, because the five per cent. is for the trouble of collecting and taking care of property under an administration; this was, however a case *cy-pres*, and the distinction is too nice to impeach the transaction. The \*pro- [ \* 324 ] party of the owner of the ship in this country was well managed for him; the vessel has earned freight to the amount of 1,200*l.*, so that the next of kin has been most substantially benefited by the liberation of the ship. No doubt, there were good reasons to induce the registrar and merchants to diminish the rate of interest, but we are ignorant of them. Risks upon two voyages were to be incurred, and were to be borne by Aldersey, and it also would seem that fourteen per cent. was the current interest at that time at Boston. It is well known, that there are many instances of a higher premium — as sixteen per cent. from Lisbon, and twenty-five from Russia to London. But even if the report had allowed the whole sum, the case would not have been better as respects the bond-holder, who is neither implicated in fraud or in error.

*Lushington, contra*. A reference to American law cannot affect the duties of a British consul with regard to British interests. The opinion also was taken by the consul himself, and the bond is given by his appointee, and for his own advantage. It is admitted, that the rule, upon a grant of administration, is not applicable; if, therefore, these charges are upheld, a precedent will be made that must be productive of infinite mischief to the mercantile world. The British ship-owner may be prejudiced by collusion. The consul would not have ventured to have detained the vessel for his fees; nor was the freight procured through his services; for the charter-party was still in existence. Whenever deductions are made, the loss falls upon the bond-holder, as well as the costs of the reference, and his own expenses upon the original hearing of the cause.

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entitled "Consul's return of the table or rate of fees of every kind charged by British consuls and vice-consuls for British shipping and British merchandise at each place, distinguishing the rate of charge under separate heads in 1792 and in 1821; also by whose authority it was made." The table referred to in the report was dated 18th of August, 1816. See 6 Geo. IV. c. 87.

[ \* 325 ] JUDGMENT.

LORD STOWELL. This case originally came before me on the last day of trinity term, in company with other cases, as is usual on that day. No time had been allowed me even for the perusal of papers, and much less for the consideration of the arguments which were constructed on their statement. In this state of things, it appeared to me most advisable to refer the consideration of them to the registrar and merchants; as, at any rate, there appeared enough to support the bond as a bottomry bond, though possibly not to its full extent. From the registrar and merchants it has come back to the court, and I hope I shall not be regarded as deviating from that attention which I am in the habit of paying to their reports, if, in a case rather singular in some respects, and in which I had not the means of aiding their judgment by many observations of my own, I examine the matter rather fully.

Bottomry bonds are held in great sanctity by the maritime courts of Europe generally; they are so in the maritime courts of this country; and under something like a particular necessity. They are usually given for the payment of repairs and other necessary expenses incurred in foreign ports, where the owner and captain have no personal credit. In most of those countries governed by the civil law, repairs and necessities from a lien upon the ship herself. In our country the same doctrine had for a long time been held by the maritime courts, but after a long contest it was finally overthrown by the Courts of Common Law, and by the highest judicature of the country, the House of Lords, in the reign of Charles II. There

[ \* 326 ] might be some reason to fear that other countries might mete out the same measure of justice to our ships in their ports, if this mode of personal contract were not resorted to and supported, for cases of imperious necessity in their ports, and with the benefit of a high premium, or maritime interest, to encourage the relief of our ships.

I have endeavored to find in the authorities, ancient as well as modern, the regulations, if any, which have been allowed to courts in restraining any exorbitance of maritime interest. But I do not find any, either in more ancient writers, or in the later authorities, such as Emerigon and Pothier, and the modern writers upon maritime and commercial law. There have been a few instances, though a very few, in which this court has exercised, with great caution, a control, in the way of a reduction of the stipulated interest, where it appeared exorbitant; and I think, it rather difficult to say that no such power exists. The contract, even if made by the owner himself, may be a contract made under an undue advantage taken of his distress. But

it is generally not made by the owner, but by the master who represents him; and not by special appointment of him for that purpose, but only by the operation of law acting upon an emergent and unprovided necessity, probably sometimes incurred not with the greatest prudence, considering that it is to impose the payment of an obligation upon another person; and, therefore, where there is a manifest want of such prudence, it requires some degree of correction. At the same time, a court, in a distant part of the globe, can form only an imperfect measure of the distress existing, and of the difficulty of obtaining the needful supplies \*at the place where they are [ \* 327 ] furnished. The money is to be advanced for persons unknown and resident in a foreign country; it is to be advanced upon an adventure which may totally fail of success, and the money may be irrecoverably lost. Upon all these considerations, a court should be inclined to take the agreement as it stands, and not to disturb it, unless it be somehow vitiated by the party who objects to it. There may be cases where there are manifest errors in the calculation, or in the basis upon which it has been made, that may call for correction. But the presumption is in favor of the original contract. The present case is, undoubtedly, distinguished by some special circumstances, and, in particular, that the bond is given for the services of a British consul. Such an item I do not remember in any bottomry transaction; but I am not prepared to say that it may not properly be incurred. He cannot be compelled to advance money, nor without adequate security. If, then, he is not obliged to furnish advances, I cannot say that they may not find their way into a case of bottomry. The necessity of the case will justify what that necessity may require.

The voyage on which this business originated was from Bristol to Boston, and took place in 1822, with a cargo consigned to a Mr Winslow, of the latter place. After discharging it, the ship was to proceed to New Brunswick, where, by her original charter-party, a cargo was to be provided for her. She suffered much distress on her voyage to Boston, and this was aggravated by a distress of a very grievous and calamitous kind—the death of the master, who united in his person the character of owner. He was succeeded by the mate, the \*natural successor, but in some respects, [ \* 328 ] in this instance, a very unfit and incompetent person, and so felt and acknowledged to be by himself, who was eager to return to his humbler situation. In this state of destitution she came, for the delivery of her cargo and the receipt of her freight, into the hands of Mr. Winslow. But he was not the consignee of the ship, and was averse to be troubled with her concerns. After a short trial he repair-

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The Zodiac. 1 Hagg.

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ed to Mr. Manners, the British consul, and, as such, the guardian of unprotected British property. He willingly undertook the charge, and sedulously performed it. He received the freight, took care to pay the sailors, who were clamorous, applied the freight to that purpose and to the payment of other necessary expenses, substituted a new captain, and he himself finally accompanied the ship to New Brunswick, where a cargo had already been provided, agreeably to the old charter-party. In short, he performed all the services necessary for her, in a manner which has procured him the amplest eulogiums from the highest authority in the place; amongst other acts, for declining to take out administration to the deceased captain, and still more for preventing the seamen (by paying their wages) from taking the same measures, which, by the laws of that country, as creditors, they were entitled to do. High commendation is bestowed upon the consul for having so declined it himself; but I cannot say that this is a merit that can be placed very high; and in truth there seems the less reason for claiming that particular merit, if he is to have the same five per cent. for not taking out administration, as if he had taken upon himself the arduous [ \* 329 ] duties of that vexatious office. Much merit is, \* undoubtedly due to him for preventing a waste of the property; but it does, not, I think, go beyond that.

For his services, laudable and beneficial to the property, 5 per cent. is charged upon the total value, estimating the property at 4,000*l*; and this bond of bottomry is, in a large part of it, made up of that charge, as the proper remuneration for his services. I did not remark that any objections were made to the other articles which the bond covers, and I shall, therefore, confine my consideration to this per centage, which is certainly, as I have observed, not an article of ordinary occurrence in such bonds. It forms one of its singularities that I have alluded to.

Reliance has been had upon a printed tariff, in which a five per centage is allowed to a consul for the preservation and management of intestate's effects; but, whatever the authority of this tariff may be, I do not think it extends to the present case. Here is no proof of any kind that these are the effects of an intestate. There might be a will in England, and no Court of Probate has, by any grant of administration, declared such an intestacy; and upon such grounds alone, I am inclined to hold that it does not apply to this case.

Another circumstance peculiar in this bond is, that the person who furnishes the money, and to whom the bond is given, is described by the captain, whom Mr. Manners himself substituted in the ship, not as a merchant, but as a mere clerk in the counting-house of the merchants particularly connected with Mr. Manners, and confidentially

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employed by him, and vouched by him as witnesses to the integrity of the transaction. These are circumstances which may be most probably of little \* real importance, if true ; yet, as they [ \* 330 ] have furnished a ground for unfavorable observations, would perhaps have been more prudently avoided in the conduct of the transaction.

The registrar and merchants have taken a strong alarm at this charge of 5 per cent., notwithstanding the favorable report of the Attorney-General, and the associated merchants at Boston, who have given their opinion thereon ; and I confess, that I so far agree with the registrar and the assistant merchants, as to think the allowance of 5 per cent. upon the property is not the proper remuneration for these services.

It by no means follows, that if merchants mutually take and give a per centage, it furnishes the measure of remuneration in the present case, for abstractedly it may be highly unjust ; for the trouble regarding a large property may be very small, and in small property very great, and, therefore, in both cases very disproportionate ; but amongst merchants it is equalized, by recurring in some instances in the shape of a benefit, and sometimes in that of a burden. It is a sort of circulating medium — a current coin amongst merchants, by which they derive a benefit in one transaction, and sustain a burden in another. But the consul has no such mutuality that can make a per centage relatively just with respect to him. He is acting, not as a merchant under the *Lex Mercatoria*, but as a public officer of the state, entitled to a liberal *honorarium*, fit to be enforced by law, if requisite, for his attentions. But I hesitate to think of establishing a precedent which may have the effect of giving a remuneration in the case of a very valuable ship for very small services performed.

\* Another objection occurs in this case to the calculation [ \* 331 ] itself, as well as the principle on which it is founded. It is calculated upon a value of 4,000*l.* at which the property was estimated. It is true that an old printed paper, dated the 1st of January, 1822, was found on board, in which the value of the ship is stated to be 4,000*l.* ; but the sum thus represented as her then value cannot be a criterion of her value in America, — a year and a half afterwards ; and, therefore, there is sufficient ground, even if a per centage were the proper mode of remunerating the consul, not to give him a per centage on this sum, merely because the owner had at one period represented 4,000*l.* to be her value. There is likewise a valuation by three American merchants, but it does not appear how formed, stating that to be her value ; and it has also been said, that she was insured at that sum. But offices of insurance do not, I apprehend,

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look very minutely into the real value of ships with which they are connected; so that the sum at which this vessel was insured may be regarded as a nominal value, taken merely for the sake of an insurance. It is, however, perfectly clear, that in 1821, almost immediately prior to the date of the asserted value by the owner in such printed paper, the ship was only worth 1,842*l.*, for the owner, who died then, purchased her at that price. Indeed, after her repairs in America, and arrival in this country, she was sold for only 2,675*l.*, payable in bills at six, twelve, and eighteen months, which would reduce the sum actually paid at the time below 2,500*l.*

It is quite impossible that the intermediate value of this ship, mentioned in this printed paper, could have been the real and exact value of the ship alone, — that would be an unreasonable supposition; \* nor does it appear to be given with any minute or satisfactory proof of its reality; and it most probably comprised the whole of the outfit of the voyage upon which she was then proceeding; and there does not seem to be any substantial reason for fixing upon this intermediate value than upon either the sum of 1,842*l.* or 2,500*l.*, in which latter case nearly one half of the sum charged would be lopped off, even allowing it upon a per centage.

Having disposed of this per centage, it remains that I should provide upon my own judgment a reward commensurate to the honorable services which the consul has certainly performed. Whether the business might have been done more frugally, as has been contended, is a point which I am disqualified, by inexperience, from judging with any degree of confidence. The services and the mode of performing them are approved in strong terms by local authorities better instructed, both legal and commercial, — by the Attorney-General and merchants of the province; and the court will abide by the ample testimony with which they have marked his exertions. I own it appears to me that the registrar and merchants have estimated the merits of the consul at too low a scale, in assigning to him a reward of about 35*l.*; they appear to me to have been in too economical a humor on the morning upon which they made their report, and to have taken matters quite at the freezing point. I shall pronounce for the sum of 100 guineas; but I mean this sum so given should be considered as including the maritime and other interest. I also pronounce for the maritime interest of 14 per cent. (which is [ \* 333 ] not at all too high or exorbitant under \* the peculiarities of this transaction) upon the other articles of the bottomry-bond, and 5 per cent. interest thereon from the period the registrar and merchants have fixed for the payment of the bond; and I direct the registrar to amend the report accordingly.

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The St. Johan. 1 Hagg.

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Under the singular circumstances of this case, I dismiss the reserved question of costs.

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ALBION. Best.

January 28, 1825.

Upon the admitted validity of a bottomry-bond, a question as to the propriety of incidental charges referred.

In this case three actions were entered for the recovery of three bottomry-bonds, precisely of the same tenor. The money had been advanced at the Mauritius, in consequence of an advertisement by the master, and there was no impeachment of either of the bonds. On this day, a prayer was made to the court to consolidate the actions, which was not opposed; and the court was further moved to pronounce for the validity of the bonds, and to decree a monition against the sole owner of the ship, and his bail, for the payment of the amount of the bonds, together with interest and costs. On the part of the owner, the validity of the bonds was admitted, but the prayer for a monition was opposed, on the ground that the court would allow a reference to the registrar and \* mer- [\* 334 ] chants to examine the propriety of the charges, and to decide upon the rate of exchange and the currency. The Court pronounced for the validity of the bonds, and intimating that the application for a reference, under the circumstances, was unusual, the matter stood over for some time, when the consideration of it was referred as prayed, and the cause was disposed of upon the report, without any further return to the court.

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ST. JOHAN, Havemeyer.

February 18, 1825.

**Mariner's wages.** A protest, on the ground of non-liability pending a question in the Court of Chancery as to the ownership of the vessel under an assignment, (the parties having, in their answer to a bill in that court, admitted that they were the owners,) overruled.

THIS was a case of subtraction of wages brought by R. Irwen, late mate of the above ship, against Messrs. Free & Down, bankers of London.

An appearance was given for Free & Down under protest, denying their liability, and alleging in an act on petition, that in 1814, Everth & Hilton, merchants of London, made considerable shipments from this country to Norway; that by the laws of Norway being precluded from carrying on trade in that country as British merchants, they engaged one Gersse, a burgher of Norway, to act as their agent, and to enter into contracts and to employ ships in the transportation of cargoes in his own name, but for their benefit; that many contracts were entered into and ships were purchased in his name, and ostensibly as his property, of which The St. Johan was one. It was further alleged, that E. & H. kept their banking account with Free [ \* 335 ] & \* Co., and becoming greatly indebted to them as bankers, they, for security as to the repayment of advances) executed an assignment to them, "of all ships, goods, parts or shares of ships and vessels, and all their other personal estate and effects of belonging, due or owing to the said firm of E. & H., or respectively on their own separate accounts, and all their right, title, interest, possibility, property, profit, possession, claim, or demand whatsoever, both at law or in equity, to have, &c., and to sell, assign, and dispose of, to defray the expenses incident thereto, and then to pay and satisfy themselves for all sums due from E. & H. on their banker's account or otherwise, and to employ all such clerks and servants as they should deem necessary for these purposes;" that in consequence thereof, Free & Co. nominated Everth (the partnership between himself and Hilton being dissolved) their agent and attorney; that whilst so employed, he entered into partnership with Stead, to trade between this country and Norway, in the course of which shipments were made in The St. Johan, continuing to be navigated in the name and as the property of Gersse; that whilst so employed, Everth & Stead, acting under the firm of E. & Son, paid all the expenses of her outfit and other disbursements, hired the several seamen, including the said Irwen, to navigate her, and paid and discharged them all except him. It further alleged, that the firm of Free & Co., neither collectively nor individually, nor any other person authorized by them, at any time engaged Irwen to serve on board their ship, and that they are not responsible for wages that may be due to him under a con- [ \* 336 ] tract with E. & S.; that having no other \* interest in the vessel save under the indenture, they submitted that this court was not competent to pronounce upon its effect.

In reply, the mariner stated his hiring, his rate of wages, the voyages of the ship while he was on board, from the 20th August, 1817, till the 12th of October, 1818, when he was duly discharged; and that the ship earned considerable freight during that time; that he

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had since been in his Majesty's service, until he was duly discharged from it in July, 1824, when he came to London for the purpose of ascertaining who were the owners of The St. Johan, that he might obtain his wages; that upon an application at the custom-house he found she was not registered there, being a foreign vessel, and he further stated, that at the time his services were performed, Free & Co. were the owners, as they had positively sworn in their answer, dated 25th October, 1822, to a bill of complaint filed against them and others in the High Court of Chancery.

In support of the protest, *Jenner and Dodson*. The amount of wages is not disputed; but the question is whether, under the deed of assignment, Free & Down possess such an absolute interest as will charge them with the demands upon the ship, and make them liable to the mariner for his wages. We contend that their property in this vessel is qualified, and that the court cannot decide with effect upon the terms of the trusts. The question as to their quantum of interest is still pending in the Court of Chancery; and should this court hold, that as trustees, they are open to the claims of this mariner, it may expose them to other demands of a similar nature, and it may arrive at \*a totally opposite conclusion [ \*337 ] from the other court. At present Free & Down are not to be considered as the owners. The freight, as we maintain, was paid to Stead, and the mariner should apply to him and his partner Everth. The privity of contract was with them, and where that does not exist there is no responsibility. *Martin v. Paxton*, cited in *Holt on Shipping*, p. 358, 2d. ed.<sup>1</sup>

*Lushington, contra*. It has not been said who are the owners, if Free & Down are not; and it can never be maintained that the registered owners of a ship at the time of hiring are not liable to the mariner for his wages. Privity of contract exists in law with regard to them. In the case cited, the mortgage deed was executed after the time of hiring. If Free & Co. claim the benefit of the vessel, they must take the burdens; and they are responsible for the acts of their own agent. The question of freight may be unsettled, but that cannot prejudice the claims of the seaman.

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<sup>1</sup> The liabilities of a mortgagee, as affected by the registry acts, are perspicuously discussed by Mr. Trollope in his treatise on the Mortgage of Ships. See likewise 6 Geo. IV. c. 110, intituled "An Act for the registering of British vessels."

## JUDGMENT.

LORD STOWELL. This case has a connection with a cause depending in the High Court of Chancery, between the same defendants and others, but different complainants, and upon grounds of different interests. I confess it is always with great reluctance that I am ever induced to entertain a case, which, however detached, is still mixed up with a cause so situated. It occurs to me, not without [ \* 338 ] \* uneasy sensations, that the view which I take of it being partial in its extent, compared with that which is taken of it on a wider and more scrutinizing view, may be in danger of being partial in its result. This court is not in possession of the whole circumstances; there is, however, a sufficiency, as far as any evidence has been introduced, and which is principally furnished by the Court of Chancery, to induce me, in this case, to overrule my particular impressions, and to enter upon the consideration of this claim; but I cannot enter upon such cases, having such covenants, without some fear of committing hasty injustice, as it may be deemed, and without an ardent desire that it should receive its consideration elsewhere. It certainly is a case which, confined to itself, is not exactly improper to entertain in this court; it is not the same as that depending in the Court of Chancery: the party suing here is not implicated in the proceeding there. The suit there is of much greater comprehension, drawing after it a great conflict of interests. Here the party is a mariner suing for his wages, as mate of a vessel, upon two foreign voyages, and though there may be some affinity between the questions, yet there may be enough to furnish grounds for a decree upon the confined interests of this man, without in the least interfering with that jurisdiction which embraces the whole merits of the case. I have had some slight communication with the judge of that high court upon the questions, but the cause there was in too immature a state to justify him in forming any opinion upon the mass of involved and obscured transactions. More evidence of explanation [ \* 339 ] might be necessary to give a clear and distinct \* understanding of the conflicting and embarrassed interests of the contending parties; possibly there may be enough to enable me to apply a convenient justice upon the merits of the only case which I am called upon to consider.

The transactions of the parties seem to be of a very singular character: here two British merchants of this town, who are proprietors of the vessel in question, are engaged in employing her on voyages from this country to Norway; and to make them the more profitable they appoint one Gersse of Bodoë, in Norway, to navigate this ship in his own name, and to act ostensibly as her sole owner; but, not-

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withstanding, for their own use and benefit. This was clearly not a very fair proceeding with respect to the policy and laws of that country, which precluded them from carrying on trade there as British merchants. The transfer was merely colorable. It happened that this was not a very prosperous adventure; they had incurred a great debt to Free & Co., their bankers, and they were in danger of incurring a much greater. A deed of assignment was made by Everth and his then partner, Hilton, in ample terms: it gives them a power to sell and dispose of this vessel, in trust, to pay themselves, and to account. They now contend that this was not a conveyance of the legal interest, but for a special purpose; and how was this purpose answered? It does not at all appear that they so acted and executed their trust. There was no sale, no conversion of the property, nothing tending to a settlement of the concerns on either side. What may be considered a little singular is, that they appoint Everth their agent and clerk to settle these affairs. This vessel then continued in \*possession of Everth, not as his own proper- [ \* 340 ] ty, but as clerk to this banking-house. Matters went on in this course from 1814, when the deed was executed, till 1822; during that time the ship was employed in voyages to Norway, under the name of Mr. Gersse, as its owner, and the present party, who sues before the court for his wages, was hired at Lerwick, in the Shetland Isles, to go upon one of these Norwegian voyages. Free & Co. have offered affidavits that they never hired him; and indeed I do not see how they could if they had transferred their ownership. The services are not denied, and they were performed not as a common mariner, but in the more conspicuous character of mate. He was afterwards discharged, and entered into his Majesty's service. That employment, in the service of his king and country, cannot in any way be prejudicial to him;<sup>1</sup> so that, without any denial of his services, he comes to demand his wages, when he is turned round by Messrs. Free & Down, alleging that they are under no liability — a plea which, I think, cannot here be supported.

The evidence exhibited in this case is extremely material; it comes from the Court of Chancery. The bill was filed there in 1822, by Stead, who, after Hilton's retirement from the concern, carried on the partnership, though still under the name of Everth & Son; an answer was given in to this bill in the name of this banking-house; and surely there never was a more absolute admission on the part of these gentlemen than what is contained in this answer;

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<sup>1</sup> 2 Geo. II. c. 36, s. 13.

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[ \* 341 ] they say, they were the owners, not \* only affirmatively, but negatively, that no other person was the owner—the services were at least therefore accepted for them. Now, in this state of things, I think I am justified in taking these gentlemen at their word, that they are the owners and nobody else. They have sworn it, and with distinct reference to the time when this man officiated as mate. Shall I put him off to the distant day when these conflicting interests may, after the diligence which the judge of that court himself uses, or compels parties to use, finally be arranged? The obstacles may outlive the suitor. I think I should be guilty of some injustice if I did; particularly when I see that these gentlemen, now retiring to the character of mere trustees, have not been undoubtedly acting as such, nor paying attention to the proper business of that trust. Under all these circumstances, I run the hazard of doing less injustice by supporting this claim. I therefore overrule the protest, and assign Messrs. Free & Down to give an absolute appearance.

Protest overruled.

NOTE. An absolute appearance was afterwards given for Messrs. Free & Down, and they paid the wages and costs.



[ \* 342 ]

\* JOHN OF LONDON, Ellick.

May 13, 1823.

Upon the execution of a decree in a cause of possession, the court declined to interfere further by attachment.

THIS was a motion for an attachment to enforce the due execution of a decree of possession.

This vessel, having been under the principal management of Messrs. Henry and Joseph Fletcher, the owners of two eighth parts or shares, was, upon her return from a voyage, carried into their dock. Upon some differences between F. & Son and their coöwners, in respect to this vessel, the other owners having an interest in six eighth parts, applied to F. & Son to deliver up possession, and upon their refusal, they caused the vessel to be arrested, and, after the regular proceedings, possession was decreed to the majority on the 4th of February, last. On the 7th F. & Son deliver up the ship's register in obedience to a monition to that effect; and on the 18th of the same month an

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appearance was given for them. It appeared, from the affidavit of Mr. Williamson, the owner of five eighths, that upon complaining to J. Fletcher of his delay in effecting the repairs of the ship, he (F.) told him, "that it was the determination of his firm not to repair the vessel, but that they were ready to take his share at a fair valuation, as she came off her last voyage, and in her damaged state;" that, upon this, W. required the possession of the vessel, offering to discharge whatever had been her expenses in dock; that upon obtaining possession under the decree of the Court of Admiralty, the said F. declared "that he would not permit any person to come on board the said vessel in his dock to replace the planks which were removed from \*the bottom, when she was surveyed, which [ \* 343 ] was necessary to make her water-tight in order to remove her; and that he would not allow W. or any person on his behalf to pass to the vessel through his dock." It also stated, that a large vessel had been brought into the dock, and so placed as to render it impossible that the ship John should be at present removed; that she was brought in long after the arrest, and subsequent to the decree of possession; that, in consequence thereof, "the decree is rendered totally inoperative, and that he hath not any real or beneficial possession of the vessel, but that the same is still kept by J. F. by preventing her removal out of the said dock, in disobedience to the said decree."

The affidavit of Mr. Fletcher set forth, "that he has been for many years connected with his father as owners and part-owners of a great number of ships, and it has been an invariable rule with them to stipulate for, and retain to themselves the conduct and management, as ship's husbands, of all the vessels in which they might become part-owners. That they have for a long time been, and are now in partnership with W. Fearnall, as ship-builders, and carry on such business under the firm of Fletcher, Son & Fearnall; but that Fearnall is not in any manner interested or connected with F. & Son, as ship-owners, or in the ship in dispute; that in the year 1820, when W. proposed to F. & Son that they should undertake to provide and to manage ships for him, 'exactly in the same manner and under the like regulations as they did for the house in which he had long been confidentially employed,' they were induced, from the known property and character of the persons connected with him, to agree to \*the following verbal arrangement of ownery, namely, 'that [ \* 344 ] the deponent should be the ship's husband, have the whole control of the outfit and expenditure, appoint and direct the captain, employ all tradesmen, keep the accounts, receive and pay all moneys, and finally settle with all parties, and with each individual owner.



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That W. should provide employment for the ships, and that they should at all times sail and return under his directions, and that he should regularly pay over all freights to F. & Son, as they became due, subject to his commission.' That, under this arrangement, the ship John made four West India voyages; and that F. & Son had divided the profits among the several owners. That in 1823, the ship, having been much damaged on her voyage home from Archangel, was put into the dry dock belonging to F., Son & Fearnall, to be repaired by them as ship-builders. That upon some differences arising among the coöwners, F. & Son declined to repair the vessel and set her afloat again, as they would have no other remedy for the outlay, but by an application to the Court of Chancery. That, upon being served with the decree of the Court of Admiralty, W. was immediately put into possession without any opposition; and that he accepted the ship-keeper recommended to him by F. & Son, who has full permission to pass to and from the ship to the shore, and who now continues in possession of the ship. That, in the usual and ordinary course of business other vessels had been since received into the same dock with The John; that she could be made water-tight in three or four days, but then she would not be able to come out, on account of a ship called The Britton, lying at her stern, which [ \* 345 ] would require about \*two months to repair, having only come into dock on the 7th of February. That this deponent had not done any thing to obstruct the decrees of the court, and humbly submits, that W. having been put into possession of the ship without any opposition, that he (F.) hath done all that he can by law be required by this court to do, and that it is not competent for it to compel the firm of F., Son & Fearnall, as ship-builders, in whose dock the ship lies, either to repair her, or to permit other persons to go on their premises for that purpose.

In support of the motion, the *King's Advocate* and *Jenner* submitted, that the question was, whether the process of the court should have any beneficial effect for owners; and, adverting to the affidavits, they contended, that the circumstances set forth constituted a wilful and vexatious resistance to its decrees, insomuch that the party who had the legal possession, was prevented from having the actual possession. What Mr. Fletcher had done, did not amount to a delivery of a real and beneficial possession, and this must be compelled by resorting to an attachment, a remedial process that had always been reserved to this court, and applied in a variety of cases. They were, however, unwilling to contemplate the necessity

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of its issuing against so respectable an individual, but would be contented, for the present, with praying the court to make the decree.

*Luishington, contra.* The conduct of Mr. Fletcher is in every point of view justifiable; and the want of power in this court to entertain private agreements accounts for his not giving an earlier appearance; that a stipulation, of the nature and extent set forth in his affidavit, was made, is clear from the facts, although it is denied in words; and \*the authority of this court having been [ \*346 ] obeyed, all further remedy must be left to be sought in an efficient manner elsewhere. The important distinction between the partnership of F. & Son, and the firm acting under the names of F., Son & Fearnall, has been entirely omitted; the ship was placed in the custody of the firm before any dispute among her owners, and there is no case in which the court has ordered a ship out of the hands of a shipwright, much less ordered men into his yard for the purpose of her repairs. If the court should proceed to execute this decree, it would exceed its jurisdiction, and entail the commission of a trespass upon all who entered the yard against the consent of the proprietors.

#### JUDGMENT.

LORD STOWELL. The court has gone as far as it can, to act with any beneficial effect. It has restored the possession of this vessel to the owner of a majority of interests,<sup>1</sup> and he at this time is in possession. That being the case, if the vessel is injuriously detained, the remedy must be sought elsewhere in order to divest possession out of the hands of a wrongful detainer. The court, therefore, declines granting the attachment; and will not proceed to make any further order in the case.

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<sup>1</sup> February 18, 1825.

Decree of possession refused to a moiety owner.

In *The Egyptienne*, Parkman, upon the fourth default being granted, the court was moved to decree possession "to the sole executrix of H. L., deceased, who was, whilst living, the true and lawful owner of one half part or share of the said sloop." This motion was refused; but the court granted a monition calling upon the other interest to appear and show cause. The monition was not extracted; and the cause has dropped.

[ \* 347 ]

MINERVA, Bell.

April 19, 1825.

On a voyage described in a mariners' contract to be "from London to New South Wales and India, or elsewhere, and to return to a port in Europe:" Held, first, that the words, "or elsewhere," composed no part of the original agreement; secondly, that if they were not interpolated, they were words that must receive a limitation; and in the third place, that the contract being once defeated was not subsequently reinstated; and fourthly, that the conduct of the captain justified the men in their abandonment of the ship.

Constructions of special agreements with reference to the disparity between the contracting parties.

The Court of Admiralty, being a Court of Equity, does not consider the words, "binding and conclusive," (2 Geo. II., c. 36, s. 2,) as applicable to mariners' contracts of a special nature.

THIS was a cause of subtraction of mariner's wages. The summary petition, after setting forth that James Dunn was hired in the port of London, at 2*l.* per month, and that he signed the ship's articles, contained a special allegation, "that in the articles, the words, to New South Wales and India, and to return to a port in Europe, were visibly written, and the same were seen by, or known to, J. D. and to many other mariners who signed the articles," and that at the time of hiring the master also stated the voyage as just described. "That upon a close inspection of the articles, it now appears that the words, or elsewhere, are obscurely written after the word, India, but the same were not seen or known by J. D. nor by many other of the mariners at the time of the signing, nor until after the arrival of the vessel at New South Wales." The surprise and dissatisfaction of the crew, and the course of voyages the ship ultimately made, from Port Jackson to different ports in the South Seas, until twelve of the mariners quitted the ship at Calcutta, are fully detailed in the judgment. On the part of the owners, it was pleaded in an allegation, "that the ship having been taken up by government to convey convicts and stores to New South Wales, it was the primary design that she should there procure a freight and proceed to a port in India, and from thence to a port in Europe, but a discretion was vested in

the master, in case he could not procure such a freight in [ \* 348 ] the first instance, to proceed to any other port \* or ports for that purpose, and from thence to India or Europe, as might seem to him most advantageous; that since the opening of the ports in India, and in the South Seas and continent of America, to merchant ships of this kingdom, it is the usual practice for masters of merchant vessels proceeding to those parts, or New South Wales in

particular, as the primary destination, to be invested with such a discretion ; that the ship's articles are usually worded in the same manner as the articles of the said ship, and that such usage is well known to seamen engaging for such voyages, and that the words, or elsewhere, were inserted previous to the contract being executed, with a view to the probable extension of the voyage ; that the articles were lying open on the table in the cabin at the time they were respectively signed, and were understood by the men." It further set forth a plea of desertion. This, with the other averments, was denied in a responsive allegation, in which a charge of ill usage was pleaded against the master.

For the mariner, *Addams* and *Lushington* contended that the ship's articles, in order to bind the seamen, must be definite and intelligible ; that, assuming the words, or elsewhere, to have been inserted at the time the articles were signed, (which rested solely on the evidence of the master, whose conduct had been so fallacious and deceptive that the court would pay no attention to him,) they denied, that, unless the words were known to the men at the time they signed the contract, they would be bound by them, whatever might be their interpretation ; but, so far from the men being informed of their destination, they were absolutely misled. If under the word, "elsewhere," the master could have \* a discretion to keep the ship [ \* 349 ] out for years without limit of time or space, the construction would go to this, that the usual rate of wages at one port should compensate for voyages all the world over ; but there was no such latitude either in point of law, of justice, or common sense. The cases of *The Eliza*, Ireland, (p. 184,) and *The Countess of Harcourt*, Bunn, (p. 248,) have decided that there must be a limitation to these words. Freights, it is known, vary according to the risk of life, so should wages ; and every fresh risk is injurious to the mariner, inasmuch as it deteriorates the ship ; thus putting all his previous earnings into jeopardy ; for the ship is the only security, or at least the best security which he possesses. The rate of wages should be those in the Eastern Seas, where the great feature of the speculation is to take place ; and it was impossible to suppose that if there had been a voluntary contract to go to the South Seas, the crew would have relinquished the material addition of 1*l.* ; for 3*l.* per month was the scale of wages on a South Sea voyage, and the same were given at Calcutta. A voyage conclusive as regards the mariner is one on which freight is earned ; and this vessel, it seems, takes in some cargo at all the ports she touches at in the South Seas, except at New Zealand, where the men did not go on shore ; as far, therefore, as

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freight was concerned, there was some earned and disposed of at New South Wales on their return, and so far wages were earned. The contract having been first broken by the owners, it was competent to the seamen to quit the ship at any time.

*Jenner and J. Addams, contra.* The conduct of the captain was justifiable, and there is nothing that impeaches his credit. [\* 350 ] The term, "elsewhere," is \* general; and the owners are entitled to have a construction of it sufficiently liberal to cover the whole of the voyage made by The *Minerva*. The word, elsewhere, was of no use if confined to ports in India; for India was most clearly inserted. It must, therefore, be taken to imply a power in the master to seek a cargo in other seas. [COURT. If there be such a discretion, the sailors should be aware of it; they should perfectly understand that the master has such a right.] There could be no advantage in the concealment of the words; and, in fact, the insertion of them in the margin was more attractive than if embodied in the articles. Without in the least impugning the decisions in the cases cited, we submit that the court, in this case, may pronounce for a forfeiture of the wages: first, on the ground that the words were inserted at the time of hiring, and that the men understood the full meaning and import of the terms, which they only resisted in the hope of extorting an increase of wages; secondly, that they were not at liberty to quit the vessel at Calcutta, after they had engaged to prosecute the voyage. If the ship could have obtained a freight for this country at New Zealand, she would have returned home direct, and never have gone to Calcutta; so that we deny that the voyages can be called intermediate, and the few goods that were occasionally taken on board in no instance amounted to a cargo.

#### JUDGMENT.

LORD STOWELL. I have thought this case deserving of serious consideration, as it concerns a course of trade of a very peculiar nature, perhaps not yet sufficiently provided with those regulations, or that established course of practice, which are requisite [\* 351 ] \* to be applied to the conduct of a commerce highly interesting to the country at large, and to the numerous individuals who are necessarily engaged in it. The trade, from the first branch of it, consists in the conveyance of persons, whose offences render it unadvisable to permit them to remain in this country, to a very remote settlement, latterly formed, where they are to continue, according to the proportion of their offences, either for their lives, or for a limited duration of years. But this settlement, though im-

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proved and improving in its productions by the labors of these compelled settlers, as well as of those who have resorted there for the honest purposes of voluntary industry, had not for a considerable number of years been able to supply cargoes for the return voyages of the ships employed in the service of conveying the offenders.

I am not minutely informed how this difficulty of procuring return cargoes was met at the earliest periods of this settlement. I rather think that the expense to government in the conveyance of these unfortunate outward cargoes, was, in consequence of the want of returns, much more considerable than it is at present.<sup>1</sup> In later times, private ships were permitted by license to go to the ports belonging to the East India Company,<sup>2</sup> or without license they went to the ports of Batavia, and other ports acquired and held by the crown, under the title of conquest, during the late war. Since the act passed for the admission of private ships \* into British [ \*352 ] ports in the East Indies,<sup>3</sup> which had been before shut up to all but the company's vessels, except by license, a practice has grown up for vessels to proceed in quest of cargoes for the return voyages, to resort to some of those ports. Whether this course has been so uniformly pursued as to establish a kind of uniform practice, notorious to the merchants and seamen generally, I am not enabled, by the evidence contained in this case, to affirm; but it certainly appears upon this evidence, that seamen engaged for the conveyance of criminals to Port Jackson and the other settlements of the same nature, in that part of the world, do engage in the mariners' contract, to go from thence to India, and thence back to England. It seems to be a practice, likewise, that takes effect at those settlements, neither unfrequently, nor perhaps, inequitably, that the contract of the mariner is considered as ending at New South Wales, and that a new rate of wages, on an increased scale, is agreed upon for a return voyage, to take the same course to the ports of India, and from thence to England. In the present case, the voyage, which commenced in July, 1821, and not disputed between the parties, as described in the body of the mariners' contract, is to New South Wales and India, and to return to Europe.

Upon the subject of the mariners' contract, I think it not unfit to

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<sup>1</sup> By 6 Geo. IV. c. 111, s. 10, a direct importation into the United Kingdom of certain articles, being the growth or produce of New South Wales, &c. &c., is allowed without payment of any duty whatever.

<sup>2</sup> See 6 Geo. IV. c. 114, ss. 73, 74.

<sup>3</sup> 53 Geo. III. c. 155, amended by 4 Geo. IV. c. 80.

premise an observation or two, which appear to me not immaterial. The mariners' contract is an ancient instrument, necessary to describe the engagement of the contracting parties, with respect to [ \* 353 ] the only two particular obligations \* which they have contracted, and which alone were necessary to be contracted for. One of them to be stipulated on the part of the ship-owner, a description of the intended voyage ; and the other, on the part of the seaman, engaging for the rate of wages which he was content to accept for his services on that voyage.

It does not appear to me that more particulars are necessary, or indeed proper, to be expressed ; for the general law sufficiently described the general duties of both the parties, in a way which was perfectly adequate to the due enforcement of the contract on each side ; and nothing else but these two particulars, which were matter of private agreement, was necessary to be recorded, and could only be known by mutual communication ; the seaman contracting, of course, to perform all the duties which by law belonged to a seaman in a voyage so described by the ship-owner, and for which the law provided a due remedy if their mutual obligations were not fulfilled.

This mariners' contract, thus constituted, was simple and intelligible, and, as such, well suited to the humble capacities and attainments of one set of the contracting parties. It notified and recorded the two important particulars, which could only be known by communication and agreement. Other reciprocal duties of the two parties to each other did not depend on contract, but on the general law, which notified and enforced them. The mariner, by his engagement to act as a seaman during that voyage, being bound to the performance of all the duties which the law imposed on him, and his employer being bound to pay the recorded wages, and to find [ \* 354 ] proper sustenance during that same \* voyage, and all other usual and necessary accommodations. These and other mutual duties, as I have already observed, are not created by contract, but are obligations created by the general law.

In the year 1729, the contract fell under the notice of the legislature, and an act passed<sup>1</sup> enforcing, in all cases, the execution of such contract, and it is very observable that, in that act, the only particulars described as necessary constituents to be stated therein, are the two that I have mentioned — the extent of the voyage, and the rate of wages to be paid during its continuance. There followed usually in these contracts, a sort of description of the general duties of a

<sup>1</sup> 2 Geo. II. c. 36, made perpetual by 2 Geo. III. c. 31, s. 1.

mariner, not at all described or noticed in the act, which imposes no new obligations, but only recognizes some of the known duties imposed by the law; and contenting itself with that, if it does no good, it at least does no harm, beyond the payment of a small fee to the scrivener or printer, for this unnecessary enlargement of the instrument.

By reference to the act, it will appear that "the agreement is to be made in writing, declaring what wages each seaman or mariner is to have respectively during the whole voyage, for so long a time as he or they shall ship themselves for, and also to express, in the said agreement or contract, the voyage for which such seaman or mariner was shipped, to perform the same." And the second section requires that the seaman shall sign such contract within three days after he or they shall have entered themselves on board; and directs that the same shall be conclusive and binding on all parties for and \*during the time so agreed and contracted for. [ \* 355 ]

The act which thus directs that the articles shall be binding and conclusive upon all the parties who have signed the same, can hardly be conceived to apply to all engagements of a very special nature, which the ingenuity of later times may introduce into such contracts, not warranted by the general law, and imposing new obligations upon the mariner. If such are considered as binding, they must be so considered, not upon the authority of the act, which did not and could not contemplate them, but only upon the general authority of private contracts executed by the parties. In attributing to them even that efficacy, it certainly ought not to be left out of consideration what is the extreme disparity between the two parties to such special contracts. On the one side are gentlemen possessed of wealth, and intent, I mean not unfairly, upon augmenting it, conversant in business, and possessing the means of calling in the aid of practical and professional knowledge. On the other side is a set of men generally ignorant and illiterate, notoriously and proverbially reckless and improvident, ill provided with the means of obtaining useful information, and almost ready to sign any instrument that may be proposed to them, and on all accounts requiring protection, even against themselves. Everybody must see where the advantage must lie between parties standing upon such unequal ground, and accordingly these special engagements, so introduced into the mariners' contract, lean one way, to the disadvantage of the mariners, and to the advantage of their employers, by increasing the duties of the former, and diminishing the obligations of the latter.

\* The mariners' contract, in the present case, affords an [ \* 356 ] immediate instance, in a special engagement therein inserted, by what authority so introduced I know not, and tendered by the cap-



tain to these seamen as an ordinary part of that settled form, by which these seamen, some of whom can neither read nor write, engage to submit themselves to all the provisions and penalties of two acts of parliament, the one the act recited, 2 Geo. II. c. 36, the other, the 37 Geo. III. c. 73; and I observe, generally, that they are now embodied in the printed form, and tendered to the seamen to execute as part of that settled form; so that, in fact, a seaman cannot have his mariners' contract executed, without being liable to be betrayed into one of these special engagements.

In the first place, I suppose there is hardly any man, who has had experience in the character of seamen, who will believe that they know any thing about the act of the 37 Geo. III. c. 73, or of the provisions and penalties contained in that act, or, perhaps, even what such a description of it means; or that, if they were discreet persons, would, on such a voyage as this, without any consideration given in return, subject themselves to the penalties which the law had provided for a very different case — for the West India trade, in which a prevailing mischief existed at the time of enactment, and to which, on that account, strong preventatives were opposed by the legislature, but confined exclusively to that commerce.

The Court of Admiralty has never construed the words, "conclusive and binding," as applying to contracts of this special nature. It

is so laid down in a manuscript book of great accuracy,  
[ \* 357 ] \* which I possess by the kindness of the late Sir William

Wynne, composed by Sir Edward Simpson, a distinguished practitioner, and judge in these courts, who says, in express terms, that though there are words in the act of the 2 Geo. II. binding and conclusive to the contract described in that same act of parliament, yet the Court of Admiralty, being a Court of Equity, will consider how far these engagements are reasonable or not; and upon that principle this court has proceeded in later cases, as in one, particularly, where an engagement had found its way into the mariners' contract, subjecting the seaman to the loss of his wages for some years' service, performed in a variety of voyages on the other side of the globe, and in which the ship had earned numerous freights, in consequence of the loss of the ship upon her arrival at the mouth of the Thames.<sup>1</sup>

I find great difficulty in persuading myself, under these principles and these authorities, that such special engagements can be imposed upon these men as binding and conclusive, though directly contrary to all natural justice, and to the known principle of all maritime law, which considers freight as the mother of all wages; and that, wherever the owner earns his freight, he thereby gives the mariner an un-

<sup>1</sup> The Juliana, Ogilvie, Hilary Term, 1822. [2 Dod. 504.]

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deniable title to his wages. There is no end to the inconveniences and injustice which may result from such a practice, for if a seaman can, by private covenant, blindly subject himself to the penalties and provisions of one act of parliament, there is no ground upon which he may not subject himself to twenty others, which may not \* concern him; and these men, who are the favorites of the [ \* 358 ] law, on account of their imbecility, and placed particularly under its protection, may be made the victims of their own ignorance and simplicity. To such men, no such response can be made as that which is irresistibly made in other cases of contract — it is your own contract, you have signed it with your eyes open; for they want both organs of sight for reading, and organs of discernment for judging. To those who are acquainted with this court, it can be no secret how deeply some of these men are affected with surprise and concern, when they find that they have ever executed any engagement drawing after it consequences so disastrous.

If the law which applies, undoubtedly, the words “conclusive and binding,” to the two covenants therein specifically described, as the necessary contents of the mariners’ contract, is moreover to be extended to all the special engagements which their employers may interpose in that contract, it may appear to found a strong demand for the interposition of a Court of Equity, for the regulated protection of that class of individuals against the danger of such undue advantage being taken of them. Such is the known rule of the Admiralty Court, founded on its equitable nature and constitution, and I know not that it has ever been interrupted in this mode of considering these special contracts.

The primary and particular objection taken in this case is, first, to the correctness of the description of the voyage, which objection, if founded, exposes a fatal defect in the body of the instrument. It is described there as a voyage \* from London to [ \* 359 ] New South Wales and India, and to return to a port in Europe. In the margin there is added, in a way hardly legible, and without any reference as to where these words are to come in, “or elsewhere.” Now, upon the face of the instrument, I think it perfectly clear that the words “or elsewhere” were inserted upon an after-thought; at any rate, if written at the time that the other parts of the description were, they would have been placed in a different situation. I rely not upon any observable difference in the color of the ink, or the character of the writing, though there may be such; it has other strong features of interpolation.

The master, without being supported by the testimony of any one witness on board, and in no small degree contradicted by two of his

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own petty officers, the ship's steward, and the armorer, swears that it was written at the time. I think that the reason he assigns for its being so done is rather inconsistent with the strange position in which he has placed it. He says, that having formerly been in the East Indies, and finding occasion to go upon a voyage not mentioned in the ship's articles, he found great difficulty, as in truth might reasonably be expected, in inducing the crew to go along with him on that voyage, without entering into a fresh contract; and that, to guard against such inconveniences in future, he had ever since been careful to insert the words "or elsewhere," in all mariner's contracts. Now, if such was to be the virtue of these words, and such was his caution for the continued use of them, I think he would have taken care to put them in a very different situation to that which [ \* 360 ] appears upon the \* face of this instrument, and which could not fail of exciting reasonable suspicion.

It is likewise inconsistent with the notions, which he is forward to avow, of the power confided to him by his owners, of changing the voyage whenever he thought fit, and which he thinks it would have been very unwise not to have confided to him, though an apparent breach of an act of parliament, and of a solemn contract by which his owners were to be bound, and of which other parties had a vested right in demanding the observance. It appears highly improbable, too, by the unanimous denial of the crew on board, and the determined conduct of most of them under such persuasion, that any such words as "or elsewhere," composed a part of the original contract, or that they ever heard of them until after their arrival at Port Jackson; and there was no witness that proves that they were so written, though the master had read the contract publicly over to them upon the outward voyage, on some dissatisfaction which they had expressed, and which made it quite impossible that the words "or elsewhere" should not have been particularly noticed. And when these words were read for the first time at Port Jackson, there was a general expression of surprise and discontent, and an express complaint made by the crew, who desired to know where he intended to take them, and information was distinctly conveyed to him, by more than one of them, that he must answer for his breach of the articles when he returned to Great Britain.

The master is a single unsupported witness, as well as a considerable party in this cause, for it is, in fact, his own conduct that he is called on to defend, and he is contradicted by at least five [ \* 361 ] others, \* two of whom are perfectly disinterested in the present suit, and were, as I have observed before, petty officers on board this ship. He has not produced a single witness to support

him, which is a striking circumstance, though several of the crew who went with him from England returned with him. In fact, I am under the necessity of observing, that the captain is the only witness whom he himself, the conductor of this suit, has ventured to produce from on board the ship, excepting the mate, who entered the ship at a very late period after its return to Sydney Cove; and I am compelled to add to the observations made upon the evidence applying to this particular fact, that the same party who is encountered by such strong contradictions, is likewise upon other material facts encountered so effectually, as to make it irresistibly necessary for me to consider his representations as at least subject to the imputation of great inaccuracy.

Now, upon this balance of evidence, as I have intimated, I strongly incline to hold, that these words did not compose any part of the text of the original contract; but, if they did, I have no hesitation in asserting, that they are not to be taken in that indefinite latitude in which they are expressed; they are no description of a voyage; they are an unlimited description of the navigable globe; and are not to be admitted as a universal *alibi* for the whole world, including the most remote, and even pestilential shores, indefinite otherwise both in space and time: they must receive a reasonable construction, a construction which, I readily admit, must be, to a certain extent, conformable to the necessities of commerce; for I hope that few men's minds are more remote than mine from a \*wish [ \*362 ] to encourage any wayward opposition in seamen to those necessities, or to the fair and indispensable indulgence which such necessities require; for no class of men is more interested in supporting the maritime commerce of the country than these persons themselves; but the entire disadvantage must not be thrown upon them: the owners must make their sacrifices as well as the mariners.

The word "elsewhere" must, in its construction, vary much, according to the situation of the primary port of destination;—if it is applied to a country remote from all neighboring settlements, it is entitled to a larger construction—if to one which is surrounded by many adjacent ports, the limitation would be much narrowed; and I cannot help observing here, that the captain has deprived himself of an extensive latitude, by describing his primary port to be in the neighborhood of many adjacent ports which could supply cargoes. Where a trade is carried on notoriously in an established course, and that in a remote part of the world, where various obstructions may occur, I will not say, that the court might not strain hard to support a change of voyage, even on an imperfect description of it contained in the articles, if it appeared conformable to the general rou-

tine of the commerce there carried on, and presumed to be generally known to all persons who resorted there. In the case, for instance, of a return voyage to India to collect a cargo; if it was the constant habit of vessels to pursue any established course, the court might possibly favor such a construction of the contract, although not specifically expressed, though it would certainly very much im-

[ \* 363 ] prove the court's view of such a question, if that \* appeared to have been done which appears by the evidence here to have been done in several instances,—making an addition to the rate of wages, conformable to the value of navigation and sea-service in that quarter of the globe; for that might be properly considered by the owners, and perhaps by the court, as taking their fair share in the disadvantages that attended such an adventure.

I come now to the evidence of other material facts. On landing the cargo at Port Jackson, the crew, as I have already observed, expressed their extreme disappointment at the change made in their destination, in breach of the articles which they had subscribed; they are threatened by the captain, who is certainly a person of lofty prerogative notions, who claims the right to carry them, and says that he can and will carry them wherever he pleases, even to hell itself, a very favorite place of consignment in his judgment. The only choice preserved to these men was between a prison and a continuance in the ship, for such is the law and justice of that country; that it seems no other option is allowed to a seaman, whether he quits his ship for a just cause or none at all—that is never subject of inquiry. In this choice of things, they elect the ship, reserving to themselves, as they had an undoubted right to do, their demands for legal redress in the justice of their country, for such it appears was the general theme of conversation amongst them. They remained on board, performing their duty, and even if this had not been a compelled preference it would not have deprived them of that resort. The articles were violated, and remained so, though they elected, under all circumstances, to remain in the ship under this forced deviation.

[ \* 364 ] \* A voyage was commenced upon a course of experiments to procure a cargo. From Port Jackson they proceeded in search of a cargo to New Zealand, where not a man ventures to land, for fear of being made a meal's meat of by the cannibal inhabitants, as they are represented to be. From hence they take an enormous flight to Valparaiso, in the South Seas, where they take on board what the master will not allow to be a cargo, but only part of a cargo; and the ship then proceeds to Lima, where nothing is done, and thence a fresh flight to Otaheite, at neither of which places does this voyage of experiment afford any articles of cargo. From this

last place the master bends his course back to Sydney Cove, and after selling the partial cargo taken in at Valparaiso, and receiving payment for the same, they then procured a cargo, which they carried to Calcutta, for which place they ought to have proceeded originally: they landed their cargo, and were occupied in taking on board a cargo for England, the men all this time, with all apparent diligence and alacrity, discharging their duty. On two Sundays, days usually of repose and indulgence, they were employed, yet no necessity is shown for denying the usual remission of labor. It is also stated, that on the third Sunday they had hoped to obtain the usual indulgence. On that morning, however, at a very early hour, a great quantity of hides having been brought to the ship, they set to work at five o'clock in the morning, to obtain the indulgence of going on shore in the afternoon, and finished their stowage of the hides by one o'clock, and then sat down to dinner in that warm climate, solacing themselves with the prospect of obtaining their long expected indulgence of going \* on shore; but instead they [ \* 365 ] are informed that they must go to work in the afternoon of the same day wherein they had worked so many hours, to stow the hides more completely which they had put into the hold with so much labor during six hours of the morning.

They requested the indulgence which they had promised themselves upon the faith of the usual practice, and of their meritorious exertions in the morning, and applied to the captain personally and respectfully to that purpose, but received the usual answer of a refusal, expressed in the usual terms of a reference to the favorite place of consignment to which I have alluded. Upon this refusal of the captain, who himself immediately afterwards proceeded to the shore, they followed his example. Such a refusal, so produced and given, appears to a person, who must express himself with caution on such a subject, to be an act of at least harshness and indiscretion — an opposition to a fair request, under all the circumstances that had taken place.

Now, I am desirous of avoiding any expression that can endanger the discipline that must be upheld on board ships, and therefore, I only venture to say, that no necessity being shown to them — for upon that point the master is contradicted by his own witness, the mate, so far as the mate's remembrance goes; it appears at least to be what I have described it — a harsh and indiscreet act of authority, and what an owner must very much disapprove, as tending to provoke disgust and disobedience. It had of course that effect upon these mariners, who had very meritoriously stuck by their ship, and undergone the drudgery of loading a fresh cargo, but who,

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[ \* 366 ] upon his harsh treatment, took \* the remedy into their own hands, and proceeded to the shore. In the evening they stated their case to the town-serjeant, including the great original grievance, of an entire defeasance of the ship's articles, by the compelled ramble to New Zealand and the distant ports of the South Sea.

The magistrates issue a summons to the captain to appear and answer the complaint. After consultations, both private and public, with the captain, the magistrates appear to act upon the same principle of law as that which prevails at Sydney Cove — that where a seaman quits a ship, he is only to make his election between the ship and the House of Correction. The sailors unwillingly repair to their ship, but are absolutely refused admission by order of the captain, which amounts nearly to a dismissal, and they return to the shore, when they are committed by the magistrates to the House of Correction for twenty-five days; at the end of that time they are taken in the police-boat, and put on board the ship, when they collect their clothes and hammocks, which they carry off with them to the shore.

Unfounded and unsupported charges of having stolen the ship's hammocks are dismissed by the magistrates, as is likewise another equally unsupported charge, of having neglected to clear the hawser, a duty which had never been imposed upon them. The mariners' case ends, with their acceptance, after a month's interval, of stations on board another ship, about to proceed for England, at nearly a double rate of wages to that which they would have been entitled to, if they had continued on board *The Minerva*.

[ \* 367 ] Now, upon this state of facts, I am of opinion, \* first, that the words "or elsewhere," composed no part of the original contract, but were interpolated afterwards to countenance a deviation from it. In the second place, that if they did compose a part of the original text of the contract, they are words that must receive a limitation, and such a limitation as will not by any means privilege these wild and eccentric rambles, which the captain has thought proper to take, upon a voyage rather of experiment and discovery, than of commerce, and which can be defended upon no principle but such as he has unwarrantably laid down in asserting that he had a right to carry them wherever he pleased, and that his owners had given him that right; for it is proper to inform him that he never possessed such right, and that his owners could not convey any such right to him. He must understand, that his owners are only one set of parties to the contract, and that the other parties to the contract are not bound to submit to all variations which even the owners themselves may think fit to introduce into it, subsequent to its execution, without the

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consent of the mariners ; both parties are equally bound, and the one party not more than the other.

I am of opinion, in the third place, that the contract being thus defeated, was not reinstated by any succeeding act of either party. What was done afterwards by the captain acting for the owners, was a mere continued violation of it, and the submission of the men to that violation could not divest them of that remedy which they had reserved to themselves — of a resort to the tribunals of their country for satisfaction. If even they had enjoyed the opportunity of a safe escape, it would \* not have recommended them to the [ \* 368 ] court to have used it; for I will not venture to lay down so hazardous a proposition, as that sailors, when the articles are violated by their captain, are bound, at the peril of losing all their right to legal redress for such violation, to quit the ship instantly, thereby subjecting her to all the inconveniences and dangers consequent upon such a desertion, in a place where the deficiency of mariners could not be easily supplied. This court would not have attributed any such effect to their submission, even if it had not been compelled by necessity. They had a right to submit to the expired authority, reserving still to themselves the ultimate satisfaction which they looked to. And I am of opinion, in the fourth place, that the mode of treatment, which they have received at Calcutta, justified their retiring from a service in which they had meritoriously hitherto submitted to what was, in its later stages, an usurped authority.

A great outcry is indulged on account of the increased expense which their retirement entailed on the owners, which is very differently estimated by the captain at 400*l.* or 500*l.*, and by the mate at nearly 200*l.* Be it what it may, two considerations may be opposed to that complaint; first, that it is justly attributable to the treatment which they had received; and the second, that they have a much greater right to be considered the injured party in the imprisonment of twenty-five days imposed on them in consequence of the complaint of the captain founded upon no sufficient ground of reason or justice.

I think I cannot dismiss this subject without some notice taken of two of the witnesses out of \* the three, who have [ \* 369 ] been produced by the captain — they are members of two considerable houses of trade in this city — they know nothing of the particular facts of this case, but they are examined upon the general course of navigation in such voyages, and upon the usual mode of instructing their captains; upon the first of these points the one witness deposes, that he has heard of such voyages, but knows of none such as those into the South Sea after going to New South Wales;



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The George Home. 1 Hagg.

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the other, that he never heard of any such, which testimonies are certainly sufficient to negative any such known and established course of navigation; but they both admit their own and the general use of a very loose and indeterminate description of their instructions given to their captains on such voyages. I mean no disrespect to these gentlemen, who, I understand, are respectable persons, when I add, referring them to the observations I have already made, that this practice appears to require some revision; they will recollect that these men have a country, and a home, and possibly wives and families; and the banishment of such men to remote regions of the globe, for an indetermined course of time, and occupation against their consent, and in defiance of a solemn contract guaranteed by an act of the legislature, is a practice which, however approved by those who profit by it, most other men will be apt to think is much more easy to be described than to be defended. Upon the whole I do with satisfaction of mind, pronounce for the wages and the expenses.<sup>1</sup>



[ \* 370 ]

\* GEORGE HOME, Young.

May 4, 1825.

**Mariner's contract.** On an engagement to go "from London to Batavia, the East India seas, or elsewhere, and until the final arrival at any port or ports in Europe : —

**Held,** that upon the arrival of the ship at Cowes for orders, (as previously agreed between the owners and master) the seamen were not bound to proceed on a further voyage to Rotterdam.

THIS was a cause of mariner's wages. The petitioner (Larsen) alleged, that, in May, 1823, The George Home being in the port of London, and bound on a voyage to Batavia or any other port in the East Indies, and back to the port of London, he shipped himself for the voyage, and signed the usual articles for the performance of it; that, being a native of Denmark and not able to read the articles, he was informed of their contents by the master only, and from such statement apprehended the voyage to be back to the port of London; that the ship safely arrived at Batavia, where she took in an assorted cargo, and arrived at Cowes, in the Isle of Wight, on the 16th February, 1824, where she anchored. That whilst lying there, he and the rest of the

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<sup>1</sup> See the next case.

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The *George Home*. 1 Hagg.

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ship's company were informed that the vessel was intended to proceed to Holland instead of the port of London ; and that the master for the first time then informed him and the rest of the men, that the articles obliged them to proceed to any port or ports in Europe ; that the crew thereupon remonstrating against such further voyage, the captain sent twelve men on board, and directed the mate to send the ship's company on shore, and if they refused, not to let them have any provisions ; that accordingly the mate locked up the bread-room, and nine of the crew summoned the captain before a magistrate, who ordered the men to return to their duty, which they were prevented from doing by the \*mate, who sent them on shore [ \* 371 ] again in pursuance of directions from the captain ; and who, moreover, told them, that if they remained a month on board, they should not be supplied from the ship's stores. On behalf of the owners it was, in substance, alleged that on Larsen being hired, he was informed by the master that the voyage was to be to Batavia and to any other port in the East Indies, and until her final arrival at any port or ports for discharge of her cargo in Europe, and that the articles were read over or fully explained to him ; that at Batavia the ship took in a cargo of coffee and rum, the produce of the Isle of Java ; that it was fully understood amongst the crew that she was to call at Cowes for orders as to the port in Europe at which she should deliver her cargo, and that soon after her arrival at Cowes, orders were so received by the master to proceed to Rotterdam for that purpose ; that upon the crew being informed of this, seven only excepted, they declared they would not go there, and refused to assist in sighting the anchor to prevent its becoming foul, and to enable the pilot to moor the ship nearer in land ; that in consequence of their refusal to work, the master stopped their allowance of grog ; that so far from obeying the order of the magistrates, they refused to go with the ship, unless the master would pay them their wages and have fresh articles entered into ; that the ship was delayed by such refusal, as the master was obliged to hire twelve men by the run, at six guineas each to take the ship to Rotterdam, and was prevented from proceeding on such voyage till the first of March.

\* On behalf of the mariner, *Lushington* and *Haggard* ad- [ \* 372 ] verted to the principles upon which the case of *The Minerva, Bell*,<sup>1</sup> had been decided, and argued, that they were applicable to the present case, and would govern it. The owners had entirely failed

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<sup>1</sup> See the preceding case.

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The George Home. 1 Hagg.

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in proving their own averment that the articles were read over to or duly explained to the seaman, who was, in this case, an illiterate foreigner, and were thus responsible for their own negligent conduct. They had neither examined the captain nor the attesting witness to the contract, so that they had failed to discharge the duty imposed by the law upon them; that in cases of forfeiture, the best evidence of which the nature of the case admits, ought to be given by the party who insists upon the forfeiture. They admitted, however, that it might, occasionally, be necessary to repose some discretion in the captain, as to the homeward port, but that, under such a vague and general description of a voyage as contained in these articles, the ship might be taken to every port in Europe, and the mariners be ultimately left abroad, for the engagement would end upon the discharge of the cargo, and it was not stipulated that the voyage should terminate in this country. They then commented upon various clauses in the body of the printed articles, (which were in the ordinary form,) to show that a specific voyage was required to be set forth in the heading of the instrument; and that the articles themselves, as also the 2 Geo. II. c. 36, pointed exclusively to a discharge of the cargo in a port of Great Britain.

[\* 373] \* *Jenner and Dodson, contra*. The questions upon the due construction of these contracts are of great moment. We admit that the articles are not strictly confined in their terms to an East India voyage; but they are framed in the ordinary and accustomed manner, and the voyage is sufficiently set forth and described. [COURT. The ship sailed with orders to return to Cowes—that should have been so stated; and there is an end of the obscurity. Cowes is a port for receiving orders. Until the mariner knows where the port of delivery is, it is a matter of choice whether he will go. He may leave the ship. I don't wish to cramp the energies of trade, but every thing should be done for the accommodation of the mariner. A voyage to any port in Europe is enough to alarm any man.] If the mariners are to be let loose from their contract, because the place of call is not specified, it becomes utterly impossible to frame articles to meet the exigencies of commerce. [COURT. I do not see that the insertion would lead to any inconvenience; the men are now left in the dark.] We submit, upon the evidence of the two mates, that it was the understanding of the crew that the ship would touch at Cowes in her way to a port of discharge; and that from the nature of the cargo, it was expected she would go to Rotterdam. The case cited varies too much in all its circumstances to affect the present; and it cannot be maintained, that there is any great hardship in a

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voyage from Cowes to Rotterdam. [COURT. There may be a long detention.] By the general law, the master is bound to restore his men to their port of lading.

## \* JUDGMENT.

[ \* 374 ]

LORD STOWELL. The question in this case resembles, in some degree, one<sup>1</sup> which the court had occasion lately to consider, respecting the instrument called the mariners' contract. But it is much more simple in its circumstances than the former, for in that case much inquiry turned upon the conduct of the individual parties, who were mutually charged with deviations from duty. The captain was charged, and appeared to the court to be justly charged, with a *mala fides* in the construction of the instrument, and with a gross and manufactured alteration of its true and original import. He was justly charged, likewise, with a harshness and severity of temper, which rendered authority a dangerous deposit in his hands. The mariners were charged with conduct approaching to mutiny and revolt, and finally with desertion; but the court was of opinion that these imputations were followed by a total failure of proof.

In the present case, no such imputations are thrown on either side. It is a dry question upon the sufficiency of the description of the voyage, the master contending that, under that description, he had a right to go to the port of Rotterdam for the discharge of his cargo, which he had brought from Batavia to the port of Cowes, where he was to receive orders from the English owners in London for its final delivery; the men contending, on the other hand, that the terms of the contract did not bind them to that extent, but admitting that, if such was the sense of the law upon the terms of the contract, \* they were willing to comply with its obligation. [ \* 375 ] Nothing followed of misconduct on either side, but what might very naturally flow from a present opposition of opinion, and which does not appear of sufficient moment to mix itself with the real question in the consideration of the court.

The mariners' contract describes the voyage for which they undertake, "to be from the port of London to Batavia, to any ports and places, the East India seas or elsewhere, and until her final arrival at any port or ports in Europe." This is certainly a most sweeping description of the ports of unlivery, for it comprehends every port situated between the southern and northern extremities of Europe. It would apply with equal truth to Corfu and Archangel; it could

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<sup>1</sup> See *The Minerva*, Bell, *ante*, p. 347.

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not in either case be charged as a misrepresentation. But, though a true description in that sense, and, therefore, not liable to a charge of absolute deception, yet it by no means answers the beneficial purposes for which the law makes the demand in favor of the mariner, that the voyage for which he contracts shall be made known to him. The beneficial purposes for which the law makes such a requisition in his favor, are, that he may know as exactly as can be described, for what probable space of time he surrenders himself, his services, his interest, his domestic comforts, his health and personal convenience. These and other considerations are to influence his decision. With respect to the disposal of himself, he has a right to be informed as far as competent accuracy can be applied to the subject; and it is unnecessary to add that a description, which extends over one entire quarter of the globe, without any more particular limitation, [ \* 376 ] \* though geographically true, affords nothing that can be considered as bearing the shape or color of such accuracy.

It may be truly and justly said, that cases may occur in which the exigencies of commerce may not admit of such accuracy. The variations of markets fluctuating often, at short distances of time, may make it difficult for the merchant to determine to what port the return cargo shall be conveyed, and in such cases the direct accuracy that is so desirable is not attainable. But, though possibly in many cases it is not attainable, yet, in most cases, and among others in the present case, a much nearer approach might be made towards certainty, than is made in the instance of the present description. I take it, that by the preconcerted arrangement, the vessel was to come up to Cowes in the British Channel, and there to receive orders from the English owners in London, at what port the cargo was to be deposited. The proper description of the voyage ought, therefore, in the mariners' contract to have been stated, for the ship to come to Cowes, and there to receive the owner's orders for the delivery of the cargo in England, Holland, or even in the ports of the North Seas, if there was any such latter destination intended. The mariner, upon such a description, would have received full and true information of all which it imported him to know, in order to determine his mind upon the propriety of his engagement in the contract; it would be a true description, not merely geographically for the fact of the voyage, but for a proper conformity to the purposes of the statute.<sup>1</sup>

[ \* 377 ] \* If I am right in this view of the subject, the description contained in the present mariners' contract does not satisfy

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<sup>1</sup> 2 Geo. II. c. 36. ]

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The George Home. 1 Hagg.

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the statute. I am far from proposing the mode I have suggested as an universal specific for all possible cases, it is enough if it govern the present, and all such as resemble it. When other dissimilar cases occur, it may be necessary to consider what other provision may be requisite. But the general principle must be that precision must be given as far as practicable.

Upon these grounds I pronounce for the wages. From the liberality with which this cause has been conducted on the part of the merchants, I infer confidently that they will not grudge the payment of these wages, which these seamen had honestly earned in the services of a long voyage, merely because they felt the inclination of returning to their own homes, when they had approached so near their own doors, and when they had received no information of a further voyage, which, by the prevalence of unfavorable winds, might have delayed their return for a very considerable time. For I by no means think that it is proved that, though it might be confidentially, and even confidently, talked of amongst the officers, it was at all generally, or certainly, made known to the men that such a voyage was to commence.

I cannot conclude without remarking, rather as a matter of general observation than of any particular censure upon the case, that there appears to be a laxity and inaccuracy both about the structure and execution of the mariners' contract, which requires to be corrected. The present suitor, who can neither read nor write, never had the contract read over to him. It is described as the practice \*to have only one mariner called in at a time to execute, [\*378] without any witness on his part to testify the reading and the execution. It is more than a matter of doubt whether one of the mariners signed before he arrived at the equinoctial line, though required to do it within three days after entering. Other irregularities might be pointed out in the execution; and as to the present structure of such instruments, it would take me up a very inconvenient time to point out half the impertinences with which it is stuffed, and which it is high time should be corrected. I pronounce for the wages, and expenses of suit.

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The Porcupine. 1 Hagg.

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## PORCUPINE, Laing.

May 11, 1825.

**Mariners' wages.** Claim for a gradation of wages sustained upon the facts, there being no specific rate of hiring inserted in the articles. A tender of reward is an admission of services.

THIS was a suit for mariner's wages brought by William Nicholas, for his different services on board the above ship, from the 14th of May, 1821, to the 7th of November, 1823, in a voyage from London to South America, and back to England. The sum claimed was 105*l.* 13*s.*, while the tender made amounted only to 22*l.* 16*s.*, being the balance of a gratuity at the rate of 2*l.* per month.

On the part of Captain Laing, (the sole owner of the ship,) *Lushington*. The claim is made for three periods of service as mariner, at 2*l.* 5*s.* per month, from the 14th of May, 1821, to the 16th [ \* 379 ] of December; then as second mate, at 3*l.* per month, \* till the 6th of November, 1822; and from that day to the 7th of November, 1823, as chief mate, at thirty-seven dollars per month. But it was not in the contemplation of the parties that such wages should be given, or could be earned by the services of this man. The evidence shows that neither the duty of chief nor of second mate was wholly discharged by him, and that he was incompetent to perform it. It is also proved that, when he came on board, the vessel had her full complement of men, and he was received as a supernumerary. Vaughan, the uncle, has given his evidence, not only with a natural bias of affection, but with a vehemence against Captain Laing that deprives his testimony of all credit. For is it probable that he intrusted his nephew to his care without inquiring and satisfying himself as to the character of the person whom he now so severely censures, and of whose character he now denies to have had any previous knowledge? It is clear, that the only object that he had in view, for this nephew of seventeen years old, was to enable him to improve his nautical knowledge; and on this account no capacity nor rate of wages is attached opposite to his name in the articles. Even the uncle allows that "for a chief mate he considered him to require a little more experience," and from the evidence of Mr. Black, who came home in the ship from Lisbon, it appears that he was frequently directed by the captain to interfere and act as chief officer when the wind came on to blow fresh, so that Nicholas was only intrusted with that service when the exercise of it was not attended

with any danger to the ship. He was regarded more as an apprentice than a seaman, and was treated in that character by the captain. \* And it is also in evidence, that the party ex- [ \* 380 ] pressly declared, during the voyage, "that he was on no wages, only what the captain chose to give him." The wages claimed were not given except to men of the first class in their respective stations, and then only for short voyages, when they sailed under the flag of the country to which they were bound, and were liable to be attacked and plundered, and to be discharged as soon as the ship reached the port to which she was bound. He submitted, therefore, that he was not entitled to wages, at least to the extent in the schedule.

On the part of the mariner, *Jenner* argued — That the statements on the other side seemed to admit that some remuneration was due. His party certainly sailed without any specific designation or character, and without any sum affixed to his name; but he had received 2*l.* as wages for one month in advance, and it was agreed they should be raised according to the rank he might hold from time to time; and he went on board with a chance of promotion, as the captain observed at the time that he had no doubt, from his former experience, that some of his officers would leave him, from the great inducements held out to them by the patriots; and he was successively appointed to the situations that had been correctly stated. By the time, therefore, that he succeeded to these appointments, he was perfectly competent to fill them; for the observation made upon the evidence of Captain Vaughan, as to want of experience in his nephew, loses all its weight when it is remembered that, during a period of six months, he was acquiring information as a mariner, and for a whole year was on active duty as second officer, before \* he arrived [ \* 381 ] at that service for which he was not quite adequate when the ship sailed. He was acknowledged by his captain as chief officer; he kept the log in that capacity; he is the person who is blamed when a boat is lost; there are no persons whose names are inserted in the articles as filling these offices at the time we prove Nicholas to have held them. Black disclaims, for himself, the character of chief mate, and acknowledges the receipt of a compliment of 10*l.* from the captain, who occasionally availed himself of his services; nor is there any one besides who has all the responsibility of chief officer from the time the ship quitted Valparaiso, and during the delivery of the homeward cargo, which he entirely superintends. In reply to the charges made against Nicholas, he relied upon the certificate of the



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The King v. Property Derelict. 1 Hagg.

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captain, "that he had found him careful and attentive, and at all times anxious to fulfil his orders."

JUDGMENT.

LORD STOWELL. If this were a case that involved any question of general law, I should reserve it for further consideration; but it is one merely of fact, with its circumstances considerably reduced by the tender that has been made, thereby acknowledging that some services have been performed and should be remunerated. The case is, therefore, narrowed to a question of *quantum*. It has been contended, on behalf of the defence, for which the defendant is much indebted to the ingenuity of his counsel, that no right exists on the part of the mariner to receive more than 59*l*. I am not, however, inclined to watch the arguments, by which this statement is attempted [ \* 382 ] to be supported, \* very strictly; for there has been, throughout the proceedings in this cause an attempt to rob this young man, not only of his nautical skill and acquirements, but likewise of his character for common honesty; for it is pleaded, "that he was inattentive to his duties on board, and was several times charged with petty thefts, in consequence of which he was disgraced, and ordered not to appear on the quarter-deck again;" and various witnesses have been brought forward in support of these averments, which appear to me perfectly groundless and unsubstantiated. This course of proceeding enters very much into my consideration of this case, adopting fully, as I do, the representation of its merits as made by the learned advocate, who has, with great effect, answered the observations that were made in support of the defence. Upon this view of the subject, and with a wish to reëstablish the character of this young man as much as is in its power, the court is of opinion to pronounce for the wages schedule, with the expenses of this suit.

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[ \* 383 ] \* THE KING, in his office of admiralty, v. PROPERTY DERELICT.

June 8, 1825.

Appropriation of goods derelict: illegality of private distribution. On a decree of condemnation as *droits*, a moiety granted to the salvor. See 1 & 2 Geo. IV. c. 75.

ON the 18th of November, 1823, an application was made to the court for a monition against Joseph Johnson, master of the brig In-

tegrity, to show cause why certain goods found on board a vessel derelict, or the value thereof, should not be brought into the registry of the court, to be proceeded against as droits of admiralty.

The joint affidavit of Robert Haynes and William Ashton, late seamen on board *The Integrity*, set forth, — “That being on a voyage from Liverpool to Jamaica, on the 14th of May, 1823, *The Integrity*, at about three days’ sail from Madeira, fell in with a merchant vessel water-logged, and so shattered that they could not make out what she was, except that she was not an English vessel; that she appeared to have been drifting about the sea several months, as her sides, and even her deck, were covered with barnacles; that the master and mate of *The Integrity* boarded the wreck, and fished down her hatchway with a boat-hook, by means of which they dragged up a heavy trunk, containing various gold coins to the value of between 300*l.* and 400*l.*, some gold watches, rings, &c.; they also got up some cordage and claret, but found no papers that could lead to a discovery of the owners, neither could they go below on account of the water.”

It appeared that the cordage was used up on board *The Integrity*, and the claret drank by the \*master and crew; [\*384] and, on their return to Liverpool, that Johnson divided the gold coin with his crew in tolerably fair proportions.

*The King’s Advocate* stated, that the law did not sanction a private distribution; that whatever property is found derelict must be restored upon the payment of a salvage,—to the owner, if he appear in due time; but if not, it must, subject to the same demand, be condemned as a droit of admiralty.

The monition was decreed; and, in a few days, the master (Johnson) brought in the property, accompanied by an affidavit as to the goods that had been found, and as to his perfect ignorance of the law with regard to them. A decree of condemnation subsequently passed, and upon a prayer, on the part of the master, for a salvage remuneration, the court directed a moiety of the coin and other articles heretofore brought in by him, to \*be delivered out for that purpose.

## LOWTHER CASTLE, Baker.

June 8, 1825.

In an action against the captain of a E. I. C. ship for personal damage, on the ground of excessive punishment: *Held*, that the justification was sufficiently established. Charge dismissed.

In the punishment of a seaman for misconduct, previous acts *ejusdem generis* may be considered, and pleaded in justification.

## JUDGMENT.

LORD STOWELL. This is an action brought against Captain Thomas Baker, master of the East India Company's ship Lowther Castle, for damages, on account of an unjust, or, at least, excessive punishment, inflicted upon Michael Comerford, a mariner of the said ship. The imputed offence, which occasioned the infliction [ \* 385 ] of this \* punishment, was — that of a lazy and negligent performance of his duty, in unloading the ship, and of disrespectful words addressed to the officer, who had made an observation upon the insufficient discharge of his duty. The punishment was that of thirty-six lashes, inflicted upon his bare back, after an imprisonment of four or five days in irons; for which he claims a compensation of 200*l.* damages. The proceeding, which finally led to this punishment, was conducted by four of the officers, constituting what is styled, in the language of these papers, a court of inquiry, the captain then being absent upon business at the city of Canton. Upon his return on board the ship, he received the report of his officers, and, on that report, and the declaration of their opinion thereon, he directed the flagellation complained of.

It does not appear to me that there is any doubtful question of law, arising upon the illegality of inflicting bodily correction upon offending mariners — such punishment being commensurate to the offence committed, being awarded by due authority, and being administered with due moderation. The law, recognizing the authority, has been settled in the cases referred to by the counsel on both sides.<sup>1</sup> It originates in that necessity of compelling, if it cannot be otherwise had, by bodily suffering, that attention to the maritime duties, in which the lives and fortunes of so many individuals are so intimately concerned. There is no branch of our commercial maritime

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<sup>1</sup> Abbott on Shipping, p. ii. c. 4, s. 4, and the authorities referred to in the notes. *Watson v. Christie*, 2 Bos. & Pull. 224. Also *The Agincourt*, Mahon, *supra*, 272.

service in \* which the lives and fortunes of those on board, [ \* 386 ] as well as the fortunes of many other persons, are more extensively concerned, than that of the shipping of the East India Company; and the power of securing those interests, by penal infliction, is no where more cautiously guarded than on board those ships; it being, as I understand, a standing regulation of that company, that no such infliction should take place under the sole authority of the captain, though the captains employed are generally a very respectable body of men, but must be sanctioned by the report of such a court of inquiry as I have described, and the whole proceedings finally reported to the governors of that company, upon the return home of the vessel.

The immediate transaction in which this matter originated was in the unloading of part of a cargo, consisting of logs or billets of wood, about which this mariner was employed. He had to receive certain heavy logs of wood, from a lower deck, from a person who was to hand them up to him, and he was to receive them and hand them up further. In the performance of this duty he was extremely negligent and idle — so much so as to attract the observation of the superintending officer, who remarked to him how much more diligent a youth was, employed nearly in the same way, whose name was Long, and who was ready to receive and hand upwards two logs of wood, while he handed only one. In answer to this observation, he only said, that the other worked too hard, and would not be able to hold out long, and that he himself would take it easy, and would not hurry himself; that is, in other words, that he would not alter the behavior of which the officer complained, \* upon which the [ \* 387 ] officer observed, he was a disrespectful fellow.

Now, if this was the solitary instance of misbehavior, I should be inclined to admit that the punishment inflicted rather exceeded the offence, though the offence was twofold — that of slackness in the performance of his work, and of a disrespectful reply to his officer, who had reprehended him. It was, therefore, a very natural policy on the part of his counsel (Dr. Lushington) to hold out, that the attention of this court must be entirely confined to that charge; and that neither the court of inquiry, nor this court, at present, could look further back. But this point, emphatically adverted to in the opening, was not pressed in the argument, and, indeed, could not have been pursued with any effect. The general good character and behavior of this man had been pleaded, as usual, in the summary petition; and this is met by a direct opposition, contained in an undisputed article of a defensive allegation, given by the captain. The facts, therefore, of general character and demeanor, are directly put in issue between

the parties, and I am clearly of opinion, that the court of inquiry, and the captain, and this court, have a right to look further back, and to see whether this was an isolated act, or a continuation and habit of misbehavior. It is not, as upon an indictment, when a single offence is charged, and if the party is cleared of that, can be pursued no further. He mixes again with the general mass of society, perhaps with more or less imputation upon his character; but he is not associated in the same vehicle with the persons who have tried him, and who have a right to protect themselves against the dangers

[ \* 388 ] \* that might follow from his own future conduct, or from the evil example which it might have held out to the practice of others. It is a procedure connected with the future safety of the ship, dependent upon the conduct of the mariners, and whose habits of behavior are, therefore, highly interesting to them. If those habits are of a mischievous nature in themselves, and, still more, in the example of impunity which they would hold out to others, they are objects of fair consideration in the estimate of the penalties applicable to any act arising out of any such habits — laziness, for instance, and slackness in the performance of duties, are not single acts, but continuations of habit, and the same observation will apply to rude and undutiful behavior. The captain has, therefore, with great propriety, travelled into a retrospective charge of both those offences — of lazy and disrespectful behavior, and I think no charge can be better sustained by the whole of the evidence of this case, than that he was a man grossly idle, with respect to work, skulking from the most important duties on board, and, though sheltering himself from immediate punishment, by a dilatory performance of what was assigned to him, yet always performing it, as one of the witnesses expresses it, in a grumbling and growling manner, and as another phrases it, in a muttering and mumbling manner, and with a most disgusting show of dissatisfaction, and not without the use of contumelious expressions, which even the vessel itself could not escape, under the title of being only a bloody merchant-ship.

It is impossible for the court to consider this concurrent [ \* 389 ] character given of him by all his superiors \* on board, and to impute this enmity of theirs to any thing but a just displeasure at his conduct. The testimony of the officers who composed the court of inquiry — of the officer who instituted that inquiry, and those of the inferior officers, the boatswain and armorer, all unite in representing him as a worthless, lazy fellow, slovenly and careless in his habits, by no means a good seaman, extremely indisposed to work, expert at skulking from the performance of it, and, if compelled to perform it, doing it in the most negligent and dilatory

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The Lowther Castle. 1 Hagg.

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and ungracious manner. Being satisfied by this evidence of the general conduct and character of this man, I am not disposed to pay attention to his complaints, further than to consider whether the facts imputed to him in this charge are not fully supported and highly aggravated, by its being a continuation of every thing that had occurred in his conduct before. I hope few courts have a more just regard for the interest and comfort of British mariners than this; but this court will expect that seamen shall do their proper duty, and in a proper manner, and, in my opinion, this man's conduct has been one entire violation of it, including the present transaction. I am satisfied that the representation given by the officers, though with some variations, occasioned by the lapse of time at which they have been examined, is substantially correct, and justifies the making of this man pay the penalty of his general misconduct.

If I could have seen that he was a man of ordinary diligence, and had been betrayed into an act or expression of insubordination, by an unusual failure of temper and manners, I should have been inclined to have taken a somewhat different view \* of [ \* 390 ] this matter, at least at its degree of malignity. But I am satisfied that the immediate acts took place, as represented by the officers, and though the ingenuity of counsel may have discovered some minute discrepancies in the evidence given by those gentlemen, at a remote period of time from the transaction itself, yet that the explanations given by Dr. Jenner, are more than satisfactory. I do not feel it necessary to repeat them; they are such as generally presented themselves to my own mind, upon the very first attentive consideration of the evidence, and my mind has not been for a moment dislodged from the conviction with which it was then impressed: that the immediate facts took place in the manner represented by the court of inquiry; that the behavior of the plaintiff upon that particular occasion was conformable to his general tenor and habits of idleness and disobedience; and that the punishment inflicted was not disproportionate, nor executed with undue severity.

I think I ought not to admit, that two out of the only three witnesses produced on his part, one of whom is a youth of seventeen years of age, were produced at a time when they were out of the reach of a cross-examination, and that the party himself has confirmed the truth of the particular facts alleged, by his own admissions, and by the offer of suing for pardon for the offence with which he was charged.

The court decided, that the mariner was not entitled to the compensation claimed, and dismissed Captain Baker from any further attendance in this suit.

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The Providence. 1 Hagg.

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[ \* 391 ]

\* PROVIDENCE, Herd.

June 19, 1825.

**Mariner's wages.** Claim of a second mate (who succeeded to the office of chief) to the rate of wages given to chief officers upon similar voyages, established: an alteration in the ship's articles is not absolutely necessary to support his title.<sup>1</sup>

THIS was a suit of mariner's wages instituted by William Green, late chief mate on board the above named ship. The ship sailed with a cargo of female convicts from Gravesend in July, 1821, on a voyage "to Hobarts Town in Van Diemen's Land, and Sydney in New South Wales, and thence to the other port or ports in that colony, and until the termination of the voyage in Great Britain or elsewhere." The circumstances of the case are fully detailed by the court.

## JUDGMENT.

LORD STOWELL. There is no pretence for supposing that the attempt to fix an obligation upon this mariner to accept the minor rate of wages, which has been offered to him, can be maintained. It is contended, on the part of the owner, that the agreement entered into with the mate upon his appointment at Rio de Janeiro, when the former mate was discharged, that the amount of pay which he was to receive was to depend upon the discretion of the owner, upon the return of the vessel to Great Britain. Now, in the first place, it is denied by the captain that such was the agreement, and the captain seems to me to have given a fair deposition on every part of the case, and, as far as I can judge from all the evidence contained in it, to be a sensible and honest man. But even if it had been admitted by the captain, it is an agreement of such a nature as this or any other court would not be inclined to support; as it was to [ \* 392 ] leave \* this man at the mercy of the owner completely for the remuneration of his services, after these services had been performed, and well performed. I should not presume, that such an agreement had been made by the captain even if he himself had not denied it; but it is positively denied on his part. The captain describes the agreement to be the only agreement that was proper to be made in such a case, namely, that he should receive for that

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<sup>1</sup> The Porcupine, 1 Hagg. Ad. R. 378; The Gondolier, 3 Hagg. Ad. R. 190.

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The Providence. 1 Hagg.

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voyage the same remuneration for his services as chief mate, which was the ordinary remuneration of other persons serving in the like capacity—a *quantum meruit* to be established with reference to the customary payment of persons acting in similar situations.

The tender made by the owner amounts only to 4*l.*, being the sum which he was entitled to in the capacity of second mate; that is not a just estimate of the value of his services as chief mate. The former mate, whose removal from his office occasioned the vacancy that this person supplied, received five guineas per month; and in receiving that, considered himself unfairly disappointed in his reasonable expectations. He had served as first mate, in a preceding voyage, in the same ship at 7*l.* 10*s.* per month; and, upon this voyage, had expected to receive the same sum from the same owner. Upon the arrival of the ship at Gravesend, he found the terms were lowered down to five guineas; at which he expressed great discontent, but thought himself compelled to submit to the reduction in consequence of having formed pecuniary engagements which he was then obliged to discharge, and which he was unable to do without submitting to this disadvantageous alteration; but \*his discontent, with the [ \* 393 ] treatment he had received travelled with him during the outward voyage, and broke out in occasional deviations from his official duty, and finally made his removal necessary. The second mate was substituted. No alteration was made in the signed mariner's contract with reference to this change of situation, but he continued with a second mate's pay affixed to his name, and advantage is taken of that by the owner to deny his claim to any thing beyond that sum, than what depended on his own mere liberality; that is a pretension which this court will not support. His fair demand is the *quantum meruit*, estimated according to the common usage; and it is not only the fair legal demand, but that for which the captain himself stipulated in the particular bargain.

This *quantum meruit* is differently estimated in the reports of the persons appealed to. Mr. Somes, who is a ship-owner, considers wages of 6*l.* per month to a chief mate for such a voyage to be very good pay; while another witness, who is described as a captain in the same service, and to have arrived with a cargo of convicts at Van Diemen's Land at the time The Providence was there, says, that he paid 6*l.* 10*s.* to his chief mate during the voyage, and he believes that to have been the medium rate of wages to officers of that description upon such voyages at that time. The counsel for the first mate has acted with great moderation in taking the sum of 6*l.* 10*s.* per month. I should have decreed more, namely, 7*l.* 10*s.* which the first mate had received upon the previous voyage; and I



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The Providence. 1 Hagg.

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should have done this not only upon that consideration, but likewise in consequence of the resistance given to a just demand, [ \* 394 ] and of the attempt \* to fasten a bargain upon this man, which the captain proves was never made, and which, if made, was highly improper. I should also decree it on account of the length of time during which this man has been kept out of the pay to which he is well entitled.

Here has also been an attempt to fix upon this person a charge of a very high nature — a charge of contraband trading, which is entirely disproved in the answers to the interrogatories upon which alone the owner relied to support it. In my judgment the owner has taken a very erroneous view of the whole of this case. The ship is absent from England more than three years, and it is certainly an unfortunate voyage — but why is it so ? Because the ship travels out of the articles, and goes to Valparaiso, where dealings are entered into with a distressed government which cannot afford to pay for the engagements they have contracted. I shall content myself with giving what is proposed for the monthly wages, being at the rate of 6*l.* 10*s.* per month, together with the full costs of the whole proceeding.

The court decreed the wages to be paid at the rate of 6*l.* 10*s.* per month, from 15th August, 1821, to 4th November, 1824, during the period of service as chief mate — at 4*l.* per month from 13th June, 1821, to 14th August in the same year — and 5*l.* 13*s.* for board wages for four weeks and five days during which he was on board at Liverpool, subject to deduction for advances.

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[ \* 395 ]

\* ENCHANTRESS, Killoch.

July 6, 1825.

Violent assault and cruelty — charge sustained.

THIS was a suit for damages, brought by a mariner on account of a violent assault, by which his ribs had been broken, and he had been otherwise grievously injured. The suit was brought against the master of the ship, who gave in a defensive allegation, but had not examined any witnesses at all adequate to support his plea. Time had been frequently prayed to examine the mate, whom the master had described as his most important witness, but having omitted to secure his testimony while he was on board a ship in the River

Thames, for some weeks; and it not appearing that there was much probability of his returning again to this country for some time, the court, upon a fresh application, refused to grant a further delay, and the case being thus left without defence, LORD STOWELL proceeded to give judgment on it as follows:

I think it is impossible for me to deliberate for any length of time, or with any propriety, on the question between the parties, if it even was in a state to be legally considered as a question. For what is its present state, under the proceedings which have been suffered to take place? Originally it was a complaint of most unmanly and brutal cruelty exercised by a captain of a ship,—a man in the vigor of youth, upon an old seaman, for a seaman of fifty may generally be considered an old man. And this assault produced not only grievous bodily harm for the present, but such serious permanent mischief, as to deprive the unfortunate person of \*the ability [ \*396 ] of gaining his bread by his labor. The charge is publicly and formally brought forward, and is duly supported by the evidence of three persons who witnessed the outrage, and a surgeon of credit and reputation, who speaks to the result. The captain gives in a contradiction to this charge, in his own name, but does not follow up his defence; thus leaving his character at the mercy of an unrepelled accusation of this very grave nature. The ship continues in England for two months, and of course it is expected that witnesses will be produced for the defence; but not a man appears, though the vessel is all that time lying in the river Thames; and the only excuse offered for not producing them is, that the mate, the principal witness as he is termed, was engaged in the concerns of the ship, and could not afford time to attend for examination. The master then suffers the ship to sail away, leaving his character to shift for itself, and the only measure taken, of a defensive nature, is to cross-examine the witnesses produced on the other side—a cross-examination which only produces a confirmation of the depositions in chief.

The court has to reproach itself for the indulgence it has shown in deferring the hearing of this cause upon affidavits of the probable return of the mate. It ought not to have shown tenderness to the character of a man who showed so little for it himself. Finally, the defence, if it may be so called, is rested upon the evidence of two gentlemen, the consignees of the vessel, who know nothing at all of the transaction. The whole of their evidence amounts to this, that there was a general meeting of the sailors belonging to the ship, in order to their wages being paid, when they \*all at- [ \*397 ] tended, and the master made an eloquent harangue upon

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The Enchantress. 1 Hagg.

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their misconduct during the voyage, not without some panegyric on his own lenity on the occasions of their misbehavior. They were all then paid their wages. This unfortunate man was paid last, and a particular address was made to him, but he did not then complain of this improper punishment. Two or three circumstances in his situation may serve to account for this. He might suppose it was just then no time to enter on a controversy which would inevitably have put the payment of his wages in great hazard. He saw he was a marked man, the very last to be paid; and the receipt was drawn up in a particular manner, for "all demands." If he, therefore, used the language of concession and humiliation at such a moment, he did so, no doubt, to secure what such a man eagerly looks to — present payment.

Considering this a case of aggravated and unmanly cruelty, without any legal justification, I decree the complainant a hundred and twenty pounds, and the expenses of this suit.

## APPENDIX.

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### A.

P. 266.

THE judge of the Vice-Admiralty Court at Sierra Leone decreed, " that the brigantine or vessel called The San Juan Nepomuceno, whereof Henry Bentzen was master, her guns, cargo, boat, tackle, apparel and furniture, and the slaves, natives of Africa, in the said vessel, treated, dealt with, carried, kept and detained as slaves, were rightly and duly taken and seized, and that the said vessel was, at the time of the said seizure thereof, on the high seas, as far as appears, so illegally equipped, manned, navigated and employed, in that the said brigantine or vessel being the property of a subject of the crown of Spain, commanded by a subject of the crown of Denmark, and who is a resident of the Danish island of St. Thomas in the West Indies, was equipped, &c., &c. and employed in carrying on the African Slave-trade, and with the intention of importing into the French island of Guadaloupe certain slaves, natives of Africa, in the said vessel, treated, &c., &c., as slaves, in direct violation of the royal cedula of King Ferdinand VII., bearing date 10th of August, 1815, and contrary to the treaty between Great Britain and Spain, concluded at Madrid on the 5th day of July, 1814, and to the treaty between Great Britain and France, signed at Paris on the 20th day of November, 1815, and also to the treaty between Great Britain and Denmark, signed at Kiel on the 14th of January, 1814; and that the said vessel, being so unlawfully equipped, &c., &c., ought to be accounted and reputed liable and subject to confiscation, and to be adjudged and condemned as good and lawful prize, and that the said vessel, &c., &c., and slaves confined on board of her, be condemned as good and lawful prize, the slaves, natives of Africa, (to wit) 135 men, 53 women, and 81 children, to our lord the king, seized and prosecuted [ \* 400 ] by Lieutenant Robert Hagan, acting in pursuance of a deputation from his Excellency Governor M'Carthy, under 51 Geo. III. c. 23."

## B.

## A PROCLAMATION.

GEORGE, R.

WHEREAS his Majesty being at peace with all the powers and states of Europe and of America, has repeatedly declared his royal determination to maintain a strict and impartial neutrality in the different contests in which certain of those powers and states are engaged :

And whereas the commission of acts of hostility by individual subjects of his Majesty against any power or state, or against the persons and properties of the subjects of any power or state, which being at peace with his Majesty is at the same time engaged in a contest, with respect to which his Majesty has declared his determination to be neutral, is calculated to bring into question the sincerity of his Majesty's declarations :

And whereas if his Majesty's subjects cannot be effectually restrained from such unwarranted commission of acts of hostility, it may be justly apprehended that the governments aggrieved thereby might be unable, on their part, to restrain their subjects from committing acts of violence upon the persons and property of unoffending subjects of his Majesty :

And whereas the Ottoman Porte, a power at peace with his Majesty, is and has been for some years past engaged in a contest with the Greeks, in which contest his Majesty has observed a strict and impartial neutrality :

[ \* 401 ] And whereas great numbers of his Majesty's loyal subjects \* reside and carry on a beneficial commerce, and possess establishments and enjoy privileges within the dominions of the Ottoman Porte, protected by the faith of treaties between his Majesty and that power :

And whereas his Majesty has received recent and undoubted information, that attempts are now making to induce certain of his Majesty's subjects to fit out ships of war and privateers in the ports of his Majesty's kingdom, and to embark therein, for the purpose of carrying on, under the Greek flag, hostile operations against the Ottoman government, of capturing and destroying Turkish ships and property, and of committing depredations on the coasts of the Turkish dominions :

And whereas such hostile operations would be directly contrary to the provisions of the act <sup>1</sup> passed in the fifty-ninth year of the reign of his late Majesty, entitled "An Act to prevent the enlisting or engagement of his Majesty's subjects to serve in a foreign service, and the fitting out or equipping, in his Majesty's dominions, vessels for warlike purposes, without his Majesty's license," in which it is, amongst other things, enacted,<sup>2</sup> "that if any natural-born subject of his Majesty, his heirs, or successors, without the leave or license of his Majesty, his heirs, or successors, for that purpose first had and obtained under the sign manual of his Majesty, his heirs, or successors, or signified by Order in Council, or by proclamation of his Majesty, his heirs,

<sup>1</sup> 59 Geo. III. c. 69.

<sup>2</sup> Section 2.

or successors, shall take or accept, or shall agree to take or accept, any military commission, or shall otherwise enter into the military service as a commissioned or non-commissioned officer, or shall enlist or enter himself to enlist, or shall agree to enlist or to enter himself to serve as a soldier, or to be employed, or shall serve in any warlike or military operation in the service of, or for, or under, or in aid of any foreign prince, state, potentate, colony, province, or part of any province or people, or of any person or persons exercising, or assuming to exercise, the powers of government, in or over any foreign country, colony, province, or part of any province or people, either as an officer or soldier, or in any other military capacity ; \* or if any natural-born subject of his Majesty shall, without [ \* 402 ] such leave or license as aforesaid, accept, or agree to take or accept, any commission, warrant, or appointment as an officer, or shall enlist or enter himself, or shall agree to enlist or enter himself, to serve as a sailor or marine, or to be employed or engaged, or shall serve in or on board any ship or vessel of war, or in and on board any ship or vessel used, or fitted out, or equipped, or intended to be used for any warlike purpose, in the service of, or for, or under, or in aid of any foreign power, prince, state, potentate, colony, province, or part of any province or people, or of any person or persons exercising, or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people ; or if any natural-born subject of his Majesty shall, without such leave and license as aforesaid, engage, contract, or agree to go, or shall go to any foreign state, country, colony, province, or part of any province, or to any place beyond the seas, with an intent, or in order to enlist or enter himself to serve, or with intent to serve, in any warlike or military operation whatever, whether by land or by sea, in the service of, or for, or under, or in aid of, any foreign prince, state, potentate, colony, province, or part of any province or people, or in the service of, or for, or under, or in aid of, any person or persons exercising, or assuming to exercise, the powers of government in or over any foreign country, colony, province, or part of any province or people, either as an officer or a soldier, or in any other military capacity, or as an officer, or sailor, or marine, in any such ship or vessel as aforesaid, although no enlisting money, or pay, or reward shall have been, or shall be, in any or either of the cases aforesaid, actually paid to, or received by, him, or by any person to or for his use or benefit ; or if any person whatever within the United Kingdom of Great Britain and Ireland, or in any part of his Majesty's dominions elsewhere, or in any country, colony, settlement, island, or place belonging to or subject to his Majesty, shall hire, retain, engage, or procure, or shall attempt, or endeavor to hire, retain, \* engage, or procure any person or persons whatever, to enlist, [ \* 403 ] or to enter, or engage to enlist, or to serve, or to be employed in any such service or employment as aforesaid as an officer, soldier, sailor, or marine, either in land or sea service, for, or under, or in aid of, any foreign prince, state, potentate, colony, province, or part of any province or people, or for, or under, or in aid of, any person or persons exercising, or assuming to exercise, any powers to government as aforesaid, or to go, or to agree to go, or to embark from any part of his Majesty's dominions for the purpose or with

the intent to be so enlisted, entered, engaged, or employed as aforesaid, whether any enlisting money, pay or reward, shall have been, or shall be, actually given or received, or not, in any or either of such cases every person so offending shall be deemed guilty of a misdemeanor, and, upon being convicted thereof, upon any information or indictment, shall be punishable by fine and imprisonment, or either of them, at the discretion of the court before which such offender shall be convicted." And it is further enacted, [section 7,]

"That if any person within any part of the United Kingdom, or in any part of his Majesty's dominions beyond the seas, shall, without the leave or license of his Majesty for that purpose first had and obtained as aforesaid, equip, furnish, fit out, or arm, or attempt or endeavor to equip, furnish, fit out or arm, or procure to be equipped, furnished, fitted out, or armed, or shall knowingly aid, assist, or be concerned in the equipping, furnishing, fitting out, or arming of any ship or vessel, with intent or in order that such ship or vessel shall be employed in the service of any foreign prince, state, or potentate, or of any foreign colony, province, or part of any province or people, or of any person or persons exercising, or assuming to exercise, any powers of government in or over any foreign state, colony, province, or part of any province or people, as a transport or store-ship, or with intent to cruise or commit hostilities against any prince, state, or potentate, or against the subjects or citizens of any prince, state or potentate, or against

[ \* 404 ] the persons exercising, or assuming to exercise, the powers \* of government in any colony, province, or part of any province or country, or against the inhabitants of any foreign colony, province, or part of any province or country, with whom his Majesty shall not then be at war, or shall within the United Kingdom, or any of his Majesty's dominions, or in any settlement, colony, territory, island, or place belonging or subject to his Majesty, issue or deliver any commission for any ship or vessel, to the intent that such ship or vessel shall be employed as aforesaid, every such person so offending shall be deemed guilty of a misdemeanor ; and shall, upon conviction thereof, upon any information or indictment, be punished by fine and imprisonment, or either of them, at the discretion of the court in which such offender shall be convicted, and every such ship or vessel, with the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores which may belong to, or be on board of, any such ship or vessel, shall be forfeited ; and it shall be lawful for any officer of his Majesty's customs or excise, or any officer of his Majesty's navy, who is by law empowered to make seizures for any forfeiture incurred under any of the laws of customs or excise, or the laws of trade and navigation, to seize such ships and vessels aforesaid, and in such places, and in such manner in which the officers of his Majesty's customs or excise, and the officers of his Majesty's navy, are empowered respectively to make seizures under the laws of customs and excise, or under the laws of trade and navigation, and that every such ship and vessel, with the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores which may belong to or be on board of such ship or vessel, may be prosecuted and condemned in the like manner, and in such courts as ships or vessels may be prosecuted and condemned, for any breach of the laws made

for the protection of the revenues of customs and excise, or of the laws of trade and navigation.”

His Majesty, therefore, being desirous of preserving to his subjects the blessings of peace which they now happily enjoy, and being resolved to persevere in that system of \* neutrality which his Majesty has so repeatedly declared his determination to maintain ; in order that none of his Majesty’s subjects may unwarily render themselves liable to the penalties imposed by the statute herein mentioned, has thought fit, by and with the advice of his privy council, to issue this his royal proclamation.

And his Majesty does hereby strictly command that no person or persons whatsoever do presume to take part in any of the said contests, or to commit or attempt any act, matter, or thing whatsoever, contrary to the provisions of the said statute, upon pain of the several penalties by the said statute imposed, and of his Majesty’s high displeasure.

And his Majesty, by and with the advice aforesaid, doth hereby enjoin all his Majesty’s subjects, strictly to observe, as well towards the Ottoman Porte and the Greeks, as towards all other belligerents with whom his Majesty is at peace, the duties of neutrality ; and to respect in all, and each of them, the exercise of those belligerent rights which his Majesty has always claimed to exercise when his Majesty has himself been unhappily engaged in war.

Given at our court at Windsor, the 30th day of September, 1825, and in the sixth year of our reign.



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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF ADMIRALTY,

DURING THE TIME OF THE

RIGHT HON. LORD STOWELL.

AND OF THE

RIGHT HON. SIR CHRISTOPHER ROBINSON.

By JOHN HAGGARD, LL.D.,  
ADVOCATE.

EDITED BY GEORGE MINOT,  
COUNSELLOR AT LAW.

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**J U D G E S**  
**OF THE**  
**HIGH COURT OF ADMIRALTY,**  
**&c., &c.**

**DURING THE PERIOD COMPRISED IN THIS VOLUME.**

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**JUDGES.**

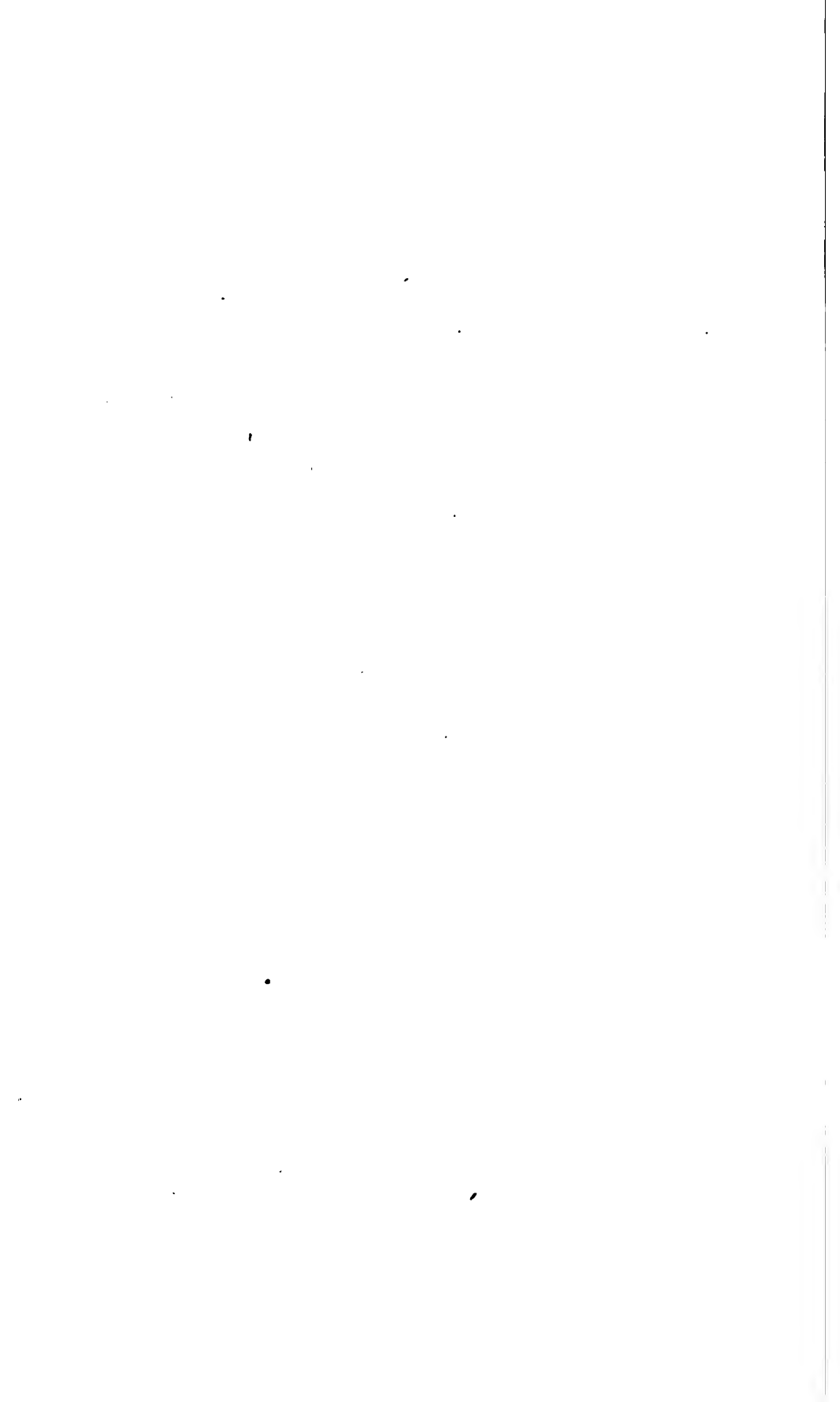
**THE RIGHT HONORABLE LORD STOWELL.**  
**THE RIGHT HONORABLE SIR CHRISTOPHER ROBINSON.**

**KING'S ADVOCATES.**

**SIR CHRISTOPHER ROBINSON.**  
**SIR HERBERT JENNER.**

**ADVOCATES OF THE ADMIRALTY.**

**JAMES HENRY ARNOLD, LL. D.**  
**JOHN DODSON, LL. D.**



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1827.

May 31.	ÇA IRA, CENSEUR, L'EXPEDITION,	Affirmed.
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REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF ADMIRALTY.

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VINE, Jay.

November 4, 1825.

Under the general rule, that a person not actually occupied in effecting a salvage service is not entitled to share in a salvage remuneration, the claim of an officer of a coast-guard detachment, who sent his men and boat, but did not assist in person, rejected.<sup>1</sup>

THIS ship, in distress near the Needles, was assisted for three days and nights, and towed into Portsmouth. There were thirty sailors, the first eight that reached the ship were employed on the coast-guard service under the command of Lieut. Porter, R. N.; but he did not accompany his men. A separate claim of salvage being given for this officer, it was alleged on his behalf, "that his men had proceeded under his directions in the revenue galley to the assistance of the vessel, that he gave them instructions, and also sent off a pilot boat to aid their exertions." A contrary statement, on the part of the owners, was supported by affidavit. The vessel and cargo were valued at 5,500*l.*, and a tender of 250*l.* had been refused.

JUDGMENT.

LORD STOWELL, after having awarded 400*l.* as a salvage remuneration, thus proceeded: The claim \* of Lieut. [\*2] Porter is quite novel. It is, I apprehend, a general rule that a party, not actually occupied in effecting a salvage service, is not entitled to share in a salvage remuneration. The exception to this

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<sup>1</sup> [As to claims of owners of vessels, see *The Charlotte*, 3 W. Rob. 68.]

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The Vine. 2 Hagg.

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rule, that not unfrequently occurs, is in favor of owners of vessels, which, in rendering assistance, have either been diverted from their proper employment, or have experienced a special mischief, occasioning to the owners some inconvenience and loss, for which an equitable compensation may reasonably be claimed.<sup>1</sup> But in this case what did Lieut. Porter do? He permitted the men under his command to perform with the boats a salvage service; and on the ground of policy I think that officers of the preventive service should suffer their boats to assist vessels in distress; but such a permission may have its inconveniences, and it may sometimes be a matter at least for consideration how far the men, employed in protecting the revenue, ought to be allowed to quit the particular service for which they are engaged. The nature and duties of this arduous service are, however, a sufficient reason for Lieut. Porter not going out in person to the assistance of this vessel: but to acknowledge him as a salvor would be to introduce a sort of prize principle very inapplicable to cases of this description. In cases of prize, a commander on shore, if the capture takes place within the limit of his station, is considered as the manager of the whole transaction, and, the property being condemned, is entitled to his proportion; but, in questions of salvage, the court must not act on the same liberality of

[ \* 3 ] principle that belongs \* to prize cases. Here all is to be paid out of the pockets of the British owner;—he alone has to discharge all demands. The application, I repeat, is novel; and, in dismissing it, I go as far as I can in allowing Lieut. Porter his expenses.<sup>2</sup>

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<sup>1</sup> See *The Mulgrave*, Garbutt, *infra*, p. 77.

<sup>2</sup> BRANSTON, Wilson.

June 26, 1826.

Claim of a passenger to salvage not sustained.

THIS brig, homeward bound, got into distress; and a lieutenant of the royal navy, a passenger on board, contributed his assistance; and claimed to be remunerated for his services.

PER CURIAM. Where there is a common danger, it is the duty of every one on board the vessel to give all the assistance he can; and more particularly this is the duty of one whose ordinary pursuits enable him to render most effectual service. No case has been cited where such a claim by a passenger has been established; though a passenger is not bound, like a mariner, to remain on board, but may take the first opportunity of escaping from the ship and of saving his own life. I reject the claim.

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The Upnor. 2 Hagg.

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UPNOR, Hadlow.

May 2, 1826.

Salvage refused for bringing into port a barge found (without anchor or crew) aground, where it was a common usage to leave barges.

ON the 15th of June the mast of a vessel was observed on the Grain Spit, close to the Nore Sand, by five men, who with much difficulty reached her: they found the water over the upper dead eyes of the shrouds, the sails (except the mizen) washing about: no person on board, and no anchor out. The men, with other assistance, were employed till the evening of the 18th, in securing the wreck and bringing her to Sheerness: she proved to be a flat-bottomed \* barge laden with manure: the agreed value [ \* 4 ] was 250*l.*; and the action for salvage was entered in 70*l.*

The owners alleged "that on the morning of the 15th, in a breeze of wind, the barge safely grounded on the inside of the Spit; that the master and lad, who navigated her, having made all safe, went to the owners at Rochester, who, on the same day, sent another barge, The Edgar, to her assistance; that the sea prevented this barge reaching The Upnor till the next morning, when those on board hailed the men in The Upnor to go about their business; that The Edgar then went away to wait for a change of wind, and did not return till after The Upnor had been taken to Sheerness; that it was a very frequent occurrence for barges to ground upon the Spit, and in other parts of the Medway, where they remain in perfect safety till they can be conveniently floated off." This practice was denied by the men, who alleged, that on the 16th they communicated with the owners of The Upnor by letter, but that no answer was returned.

*Lushington*, in support of the demand.

*Dodson*, *contra*.

## JUDGMENT.

LORD STOWELL. The affidavits are very conflicting; but I do not think that the evidence is sufficient to support the claim of salvage. It seems a perfectly novel demand. Much reliance has been placed upon the affidavit made by the agent for Lloyds, and he certainly

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The Lady Campbell. 2 Hagg.

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expresses a strong opinion that it is unusual to leave barges in the state in which The Upnor was found; but what materially [ \* 5 ] detracts from the merit of this affidavit is, that he \* is also agent for the salvors. It appears to me satisfactorily proved, that it is a common case for vessels to be left on this sand; and I think that individuals, who thus choose to expose their property to the chance of wind and weather, have a perfect right to exercise their own discretion upon the matter, and that other persons are not entitled to interfere. This sand has, it is represented, been resorted to as a landing place almost from time immemorial. Here has been an interruption of a common usage; and if I were to pronounce this to be a case of salvage it would create a very considerable alarm. I dismiss the owners, but, upon the whole, shall not allow them their costs.

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LADY CAMPBELL, Beetham.

February 22, 1826.

Occasional acts of drunkenness, not more than usual with sailors, and latterly (when more frequent) arising from the undue force given by bodily disease to the moderate use of strong liquors, will not enure to the forfeiture of a steward's wages.

THIS was a suit brought by George Gower, for his wages, first as cuddy servant, and afterwards as steward, of The Lady Campbell. The owner rested his defence on three grounds. 1st. Intoxication, and the consequent incapacity of the steward to discharge his duties. 2d. Embezzlement, or destruction of table linen entrusted to his care. 3d. That on the arrival of the ship at Blackwall he quitted her before he was entitled.

*Dodson*, for the mariner. *Primâ facie*, the duties were discharged. He quitted the ship with leave. He cited The New Phoenix, [ 6 \* ] *Lewthwaite*,<sup>1</sup> for the \* general principles applicable to cases of this description.

*Lushington, contra*. The indulgence shown to the infirmities of a common man, cannot, without injury to the service, be extended to

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<sup>1</sup> Vol. i. p. 198.

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The Lady Campbell. 2 Hagg.

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a case of this kind, where a man is paid high wages, and placed in a very responsible situation.

JUDGMENT.

LORD STOWELL. This action is brought by a mariner against George Beetham, the captain, and finally the owner of a vessel called The Lady Campbell, which proceeded as a private merchant ship, on a voyage from London to the East Indies, in March, 1823, and back again to the port of London, late in the following year. Though a private ship, she was nearly 700 tons burden; she carried out a cargo, and about forty passengers, persons in various ranks and conditions of life, and, as far as it appears, was properly equipped in all respects for the voyage and the return. But she had the misfortune to encounter, in a very early stage of her progress, such tempestuous weather in the bay as compelled her to seek refuge in the port of L'Orient, where she remained about six weeks. Gower, the mariner, was employed in her at this time in the capacity of a cuddy servant, and so continued until their arrival at Madeira, where his immediate superior, the captain's steward, having incurred the displeasure of the owner, was removed from his station, and Gower was promoted to fill it; an occurrence which carries with it an inference that no displeasure of the captain had then affected him, but rather the contrary. In this station of preferment he continued till the arrival \*at Calcutta, having made a short stay at the Cape of [\*7] Good Hope, and likewise at Madras, where she deposited several of her passengers and parts of her cargo. At Calcutta he was advanced to a higher rate of wages for the return voyage, as were all the other mariners likewise on board the ship, of which Mr. Beetham, the captain, was now the owner by purchase. It does appear that at the time of making the advance of wages, some expressions of the owner's displeasure at Gower's past conduct broke out from the captain, but the only imputation thrown upon him was that of having been neglectful; no charge whatever is made of habitual drunkenness, which habit, if it had existed, must have formed the most prominent, as well as the gravest subject of reproach. His answers to this reprimand demonstrate that no such charge was then made to him, for it consists only of a denial to the charge of neglect, and an assurance of future diligence in his conduct: but nothing that then passed between the parties carries with it the most distant allusion to any habit of frequent intoxication.

I learn from one of his two witnesses that he had been drunk once or twice on the whole of the outward voyage, which lasted nine months. Now, though this court does not mean to countenance any



criminal excess of that kind, yet it cannot so far blind itself to the ordinary habits of men living for such a length of time in a frequent condition of extreme peril and fatigue, as to feel much surprise that a seaman, having the command, as this man from his station had, of strong liquors, should have been betrayed into two acts of indulgence of that nature, nor can it consider them as sinking him [ \* 8 ] below the common average of \* a seaman's morality. I am, upon the whole, almost disposed to adopt the conclusion of this adverse witness, that he did his duty in the main very fairly; and when it is pressed that the steward has more responsibility in his station than a common sailor in the ship, it is not to be forgotten that, in times of extreme danger and fatigue, he is expected to take some share in the ordinary functions of a mariner; and that if stronger obligations of duty arise from his situation of trust, he is more exposed to the dangers of undue indulgence, from his ready access to the means of gratification.

It is, I think, no slight proof against the charge of frequent intoxication, that no such act is alleged to have been committed at the Madeiras, or the Cape, or at Madras, or at Calcutta, the port of repose, (and, as such, generally of that species of indulgence,) where he received another advancement in the matter of wages. I think the fact of his being not only continued, but advanced, first in station at the Madeiras, and afterwards in wages at Calcutta, proves that he cannot be justly deemed that incorrigible sot who was rendered incapable of performing his necessary duties. At such a place as Calcutta, and even on board his own ship, it is quite impossible that the captain could not have found one to supply his place much more efficient to perform its duties; but, instead of a dismissal, he shares in the advance of wages which were allowed for the very purpose of inducing the mariners, himself among the number, to continue in the vessel. Upon the view of all that is alleged to have happened, from the commencement of the voyage to their arrival at Calcutta, and during their stay there, to their return to Madras, I think myself [ \* 9 ] \* justified in pronouncing that nothing is proved that can fairly fix upon this person the imputation of habitual drunkenness. It is only in the latest stage that such a degree of this species of criminality is attempted to be proved, as ought, when proved, to vacate solemn contracts between the parties, executed in all the forms required by the law.

In observing upon this charge of drunkenness, I think it would have been entitled to more acceptance if it had conformed to that distinction of time to which the evidence, as far as it applies, can be deemed to apply with any effect. The general preponderancy of the

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evidence referring to antecedent periods is, I think, exculpatory, upon the grounds I have stated. In the latter stages of the history, this man appears to have labored under a great degree of bodily disorder, which discovered itself first at Calcutta, and advanced progressively, and, in the latter part of the return voyage, most rapidly, so as to render him often incapable of performing his duty, from a large and painful swelling in his neck. It is proved that, in the voyage from Calcutta to Madras he was extremely cautious of liquor, as tending to inflame his disorder, and was on that account abstemious with respect to the use of liquors. In that part of the voyage from Madras to the Cape, the disorder appears to have increased still more, and possibly increasing debility, though requiring something more of immediate support, rendered less effectual his resistance even to the most temperate use of strong liquors. At the Cape, his neck appears to have been considerably inflamed, and continued in a very aggravated state during the return, so as occasionally to prevent his \* execution of the duties of his office; from which, never- [\* 10] theless, he was not deposed, but was expected to discharge them even after its termination. Now, though it may be true, and I believe is in fact so, that such disorders about the throat and neighboring parts are sometimes produced by habits of intoxication, yet they do not invariably spring from the same cause. The same effect not unfrequently arises without any preceding connection with such habits: and when I do not find, by the history that I have detailed, that such habits did precede this disorder, I am indisposed to admit that the disorder proceeded from such habits. If a medical opinion, upon the fact of the connection between the habit and the disorder, had been properly vouched by the medical person who had himself observed the progress of both, such testimony would have been highly material; but no such person is produced, and I think the connection appears to stand contradicted by the history of the case. And even if this should be at all questionable, which I think it is not, it would be a question which the opinion of a surgeon, so delivered at a second-hand, could not be permitted to decide. The fact that the steward was not superseded from his office is more than a counter-balance to an opinion so conveyed.

Another charge is founded upon an asserted fact of the waste and destruction of the linen intrusted to his care, amounting to a considerable value. It appears that, upon the termination of the voyage, a great deficiency was found, but I see no evidence that affixes this deficiency to any embezzlement or negligence imputable to the steward. No embezzlement is charged upon him, the fact contemplated \* to be proved is the deficiency. Now it must be [\* 11]

observed, that this person did not succeed to the office of steward until the arrival of the vessel at Madeira, where the former steward had been discharged, certainly not on account of his merits. In what state these things were at this time is not proved; how many of these remained to be transferred after the stay of six weeks at L'Orient, or, indeed, at the Madeiras, does not appear. The only evidence that no spoliation had been committed at L'Orient, is that of the captain's two witnesses. The purser states that he had not seen or heard of any; and it is not very likely that, if such an act had been committed, it would have been committed in any such manner as to convey itself to the ears or eyes of that officer. He likewise states that he delivered the list of the goods contained to the present steward, but it is repeatedly denied by the steward that he received any such list, which is the less improbable because the transfer appears to have been made without the superintending eye of this officer to see whether the goods corresponded at that time with the list that had been delivered to the preceding steward. By whom this list was examined and certified at the time of the delivery, (if such delivery took place,) does not appear. No such attention seems to have been used by the captain himself, or the purser, or other person whose duty and interest require a formal and accurate superintendence at the delivery of the articles. The part of them which perished under the wear and tear of so many months, upon the outward and homeward voyage—of a year and a half's use—of so many persons, must, at least with respect to the smaller articles, be [ \* 12 ] \* considerable, and some of the larger may be presumed to have suffered no inconsiderable injury from the operation of the same causes. But I think the fatal deficiency of the charge upon this individual for the loss, whatever it may be, arises from the slovenly and negligent manner in which the transfer was made to him, without any comparison of the things delivered with those enumerated in the list, if any such list then existed. The schedule now exhibited is certainly of no authority, being not verified upon oath, and cannot possibly affect the present party, who received the goods at a distance of time and after an intermediate possession.

Upon the whole consideration of this case, the proof of delinquency on the part of this mariner does not appear to be supported by sufficient evidence, so as to invalidate the repeated contracts. On the outward voyage, no imputation rests upon any solid authority, nor at any station to which the ship arrived upon her return, till her arrival at the Cape of Good Hope. There this man is charged with a commencement of habits that produced infirmities. Of the numerous passengers, not one individual is produced, nor any of the numerous

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crew, save the captain's immediate officers, the mate and the purser; and the testimony of one of these, a very fair and intelligent witness, is repugnant to the charge. I think there occurs in many parts of the evidence a deficiency of particular and authentic intelligence which the court ought to have received, and no account is given in at the end of the voyages of any preliminary conversation, that led to the diminished offer of 40*l*. To the party and to the court the offer is presented in the form of, "Here is 40*l*. for you, and if you don't \*accept it, you may go away." No explanation [ \* 13 ] passed at the time, nor was any reference made to former explanations, nor to the grounds and considerations on which that particular sum is offered. These defects in the evidence have been occasionally, in argument, attributed to the dispersion of the witnesses, the surgeon, the passengers, and the people of the crew. If it is so to be accounted for, it is the misfortune of the captain and owners, and cannot be taken into the account, so as to act to the disadvantage of the other party; and I think I should much exceed the proper bounds of judicial caution, if, upon evidence so defective, I should withhold from this unfortunate person the benefit to which he is entitled, not only by repeated contracts, but by those contracts likewise confirmed by the master's continuation of him in the office after full and fair opportunities of his removal from it.

It cannot be denied that there are discordances in the evidence which do not admit of any natural and easy reconciliation, and which must be attributed to the natural effects of those habits which frequently dis-color evidence upon such subjects; but my opinion is, that there is a preponderancy upon the evidence in favor of the claim; for that evidence, fairly taken, exhibits the claimant as a person on the outward voyage not more than usually subject to the common habits of seamen. It would seem that it was not till after leaving Calcutta that his bodily disorder broke out, and produced a degree of weakness which gave an undue force to the influence of strong liquors, even moderately used; that the bodily \*weakness itself, together [ \* 14 ] with the effect, naturally increased upon their arrival at the Cape, and upon the following voyage, and that the fair result of this evidence is, that this person is rather to be considered as the victim of bodily disease, than of an habitual resort to a gross and disabling intemperance. I am the less inclined to enter more particularly into these inquiries, which contain some other charges of an inferior order, because it appears to me that the substantial difference between the parties is reduced to a very small value. The original sum demanded by the steward amounts to something above 89*l*., from which are to be deducted the payments he has already received, which I shall refer

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The Ealing Grove. 2 Hagg.

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to the registrar; they seem to amount to about 25*l.*; there must be likewise deducted the three sums of 15*s.* each, which do not appear in the articles, and which this court cannot enforce upon that account.<sup>1</sup> If these sums are tolerably correct they will make a reduction of 26*l.* or 27*l.* from the sum demanded by the steward; the parties have likewise offered 40*l.*, to which offer I shall certainly hold them bound; so that in fact the whole disputed sum is reduced to about 23*l.*, or thereabouts, and this upon a voyage to the East Indies and back again, for full eighteen months' continuance.

I refer these accounts to the registrar with these directions, which I trust will, upon every consideration of prudence, terminate the present controversy.

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EALING GROVE, Falconer.

June 13, 1826.

A sailor's wages and expenses pronounced for; as getting drunk on shore (at Dominica) and not returning on board immediately leave of absence expires, (his clothes and other property being on board,) is not an act of desertion, working a forfeiture of wages; and is amply punished by seventy-five days imprisonment in the island, when the man was willing to return to his work.

THIS was a cause of wages. The summary petition alleged "that in December, 1824, The Ealing Grove being bound on a voyage from London to Dominica, James Carman was hired as a seaman for the voyage, and signed the usual articles; that the vessel arrived at Dominica on the 11th of February, 1825, and there discharged her cargo; that on the 13th, while the ship was at Dominica, the chief

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<sup>1</sup> The purser of The Lady Campbell had also sued for his wages; and, in answer to his demand, the owner pleaded, as a set-off, that 183*l.*, a sum which exceeded the balance claimed by the purser, was due to the owner for the passage of the purser's wife. The allegation was opposed.

PER CURIAM. This court cannot enter into the merits of this plea: at least I have no recollection of a plea of this description being here received. In cases of wages the court has an admitted jurisdiction; but this is a question of passage-money. The owner must sustain the inconvenience of setting forth his claim in another court.

The court rejected the allegation; and pronounced for the wages (admitted in court to be due) and costs.

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The Ealing Grove. 2 Hagg.

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mate gave Carman and two other seamen leave to go on shore, which they did about 3 o'clock, P. M.; that there being at the time no urgent duty on board, they did not return that night; but about 11 o'clock the next day, as they were returning on board, they were taken into custody at the instance of the master upon a charge of desertion; that they were committed to prison, and for the first forty-eight hours were not allowed any thing to eat or drink. That Carman remained in prison seventy-five days, and became ill from the badness \* of the food; that on the 1st of May, the [ \* 16 ] master ordered him on board in his weak state, but would not permit him to do duty on the homeward voyage, informing him if he attempted it, he would blow out his brains. That the ship arrived at London in June, 1825, and earned considerable freight."

It was pleaded, *contra*, — "That Carman, on 27th December, 1824, while the ship was coming to an anchor in the Downs, and on many occasions during the voyage, conducted himself in a disobedient and mutinous manner, and refused to do any duty; that in consequence of his general bad conduct, and on account of his not returning to the ship at Dominica, on the evening of the day on which he went on shore, the master and chief mate caused him to be apprehended; that Carman, upon being brought before the magistrate, replied in a most insolent manner, that he acknowledged no law or authority over him in the country, and refused to return on board; whereupon he was committed to gaol."

The allegation further pleaded, "that by an act (passed at Dominica, in 1804, and confirmed by an order in council) entitled, "An act to prevent masters of vessels from carrying debtors or their effects from off this island, and from leaving their seamen on shore, &c., and to empower justices of the peace to determine disputes between masters and seamen;" sect. 11 & 12, it is enacted, "that on complaint being made to any justice of the peace of the island by the master of a vessel, that any of his seamen hath deserted without the leave of such master, or, having come on shore with leave, or on duty, and refused to return on board, such justice is authorized and required to issue his warrant for \* the apprehension [ \* 17 ] of the seaman, and to determine the difference, if any there may be, between the master and seaman, and to order the seaman to return on board; and, in case of refusal, to commit him to gaol until he consents to return on board, or the vessel is ready to sail, when, on the application of the master, the seaman is to be delivered to the master, he, the master, paying all lawful fees and expenses, which he is authorized to charge against the seaman's wages, or so much thereof as the justice, before whom the seaman was originally car-

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ried, shall direct. That if any seaman not usually residing in the island shall be found on shore while the vessel to which he belongs remains in any of the ports or bays of the island, and the master of such vessel shall refuse to take him on board, on proof thereof being made on oath before one justice of the peace of this island, such justice may direct a constable to put the said seamen on board of the vessel at the expense of the master thereof; and if such seaman shall remain on shore after the departure of the vessel from this island, the bond entered into by the master and his sureties is forfeited. That the bond is required by the act to be entered into by all masters that arrive at Dominica, before clearing out of their vessels, with two sufficient sureties, by which they become bound to his Majesty, &c., in 1,000*l.* sterling; conditioned, among other things, that provision be made for sailors or other persons brought to the island, that they do not become chargeable to the public, or be found destitute or begging within six months after the departure of the vessel." The allegation pleaded, "that such bond was entered into by the master of The Ealing Grove; and denied that Carman was prohibited [ \* 18 ] \* from doing duty on the return voyage, or threatened with personal violence; but he was not required to do duty, inasmuch as he was considered as not belonging to the ship." This allegation was admitted after argument; and a responsive plea being afterwards admitted, the cause came on for hearing upon the effect of the evidence. The sum demanded was 10*l.* 17*s.*

*Lushington*, for the mariner.

*Jenner*, *contra*.

#### JUDGMENT.

LORD STOWELL. The numerous and bulky papers in this case contain a question of small importance in pecuniary value, arising upon a claim made by a seaman against the part-owner and master of the ship Ealing Grove, as the residue of wages yet due for a voyage from London to Dominica, and a return voyage to London. The rate of wages is not disputed, but the payment is resisted upon the assigned grounds of misbehavior during the outward voyage, and an act of desertion committed at the Island of Dominica, where the seaman suffered an imprisonment for no less a period than seventy-five days, and was then brought to England without wages, or any permitted labor in his capacity of seaman.

One circumstance at the outset of the voyage is stated by the captain, which, I confess, has produced rather an unfavorable impression

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upon my mind, in a case where I think there are just imputations on both parties. It is alleged by the captain, that upon an occasion happening in the Downs on the outward voyage, this mariner was guilty of a neglect of duty in what is termed a \*pay- [ \* 19 ] ing out of the cable. The mariner alleged as an excuse, that there were too many men already employed in that business; that they were in each other's way; and that therefore he retired from that service to make preparations for the ship's breakfast, of which the time was very near. The captain did not admit of this reasoning, and ordered him back to his employment, which order he obeyed, but not without using expressions of a very mutinous and disorderly nature; such as, "that he would not obey any orders but such as he himself approved, and that he would not be controlled by the captain." These words are not proved; but taking it that such words were used in the hearing of the captain, I cannot but think that he comes with rather an ill grace to require from the court any redress for subsequent ill-behaviour, after having suffered such outrageous behavior as this to pass with perfect license and impunity, when it was perfectly not only within his power, but, as I think, within his duty, to give himself redress by an immediate discharge of the seaman. This was at the very outset of the voyage, in the Downs, where it was easy to procure another mariner, able and willing to do the duty which this man declared he would not do, though he had signed articles to a contrary effect a day or two before, and had obtained, for that reason, the terms of payment which he himself had dictated.

A previous circumstance had occurred, which is represented, in the evidence, as having given an undue provocation to the captain, and to have led to all the unfortunate consequences that followed at Gravesend, where the articles were signed. It was proposed by the captain that they should be signed for 45s. the month. Some of the men objected \*to this, as being below the [ \* 20 ] common rate of West India wages. Carman headed the party that objected, and refused to subscribe the articles for less than 50s.; and this being resisted for some short time by the captain, the objecting party called a boat, took their clothes with them, and were quitting the ship, when they were recalled by the captain's submission to their demand, and they executed the articles. I find no reason to believe that their demand was not justifiable by the common usage at that time prevailing; but it is alleged that the captain felt differently; that the demand excited strong resentments in his mind, which occasionally broke out in harsh treatment of this individual, whom he considered the leader of the opposition; and I cannot say



that there is nothing in the evidence to countenance a suspicion, that such was the effect upon the mind of the captain.

After leaving the Downs, the voyage proceeded prosperously, but not without occasional interruptions of the peace of the ship, by jar-rings between the captain and this mariner, who certainly does not appear to be a man of a soft and yielding temper, but, as one of his witnesses describes him, "a wranglesome chap." At times, another witness says, "that on account of the dispute about wages, the captain and chief mate were always foul of him. The man tried to be peaceable enough, but they were always jawing of him, and finding fault with him without any occasion." Some incidents during the voyage are mentioned to his disadvantage. He one day brought up a piece of beef with a complaint that "it was not altogether so good;" but it rather turns out upon the evidence to be a complaint

that he had no vegetables with it, the beef being at the  
[ \* 21 ] \* bottom part of the cask, where it is inferior and rather unsavory without such an accompaniment, although not unwholesome; for I think it is to be admitted, that the larder on board this ship was very decently provided.

It is stated, likewise, that when they approached Dominica he neglected or refused to reef the topsails; but the proof is, that he was employed in other duty, and did not refuse to execute this; and the charge concludes, I think, rather ludicrously, — that he endangered the safety of the ship by calling off the attention of the captain from the care of its preservation, by irritating him. There are two or three other incidents that occurred in the voyage, pretty much of the same nature, which show him to be, whether justly or unjustly I will not say, very obnoxious to the resentments of his captain. Upon the last of these occasions he requests his dismissal from the captain, by saying, — "Sir, it is quite clear that you and I cannot agree; therefore, I hope, when we get to Dominica, you will give me my discharge from the ship." This was no unfair demand on the part of this person, particularly if he conceived himself to be a marked man, treated with peculiar unkindness. The answer of the captain, vouched by two witnesses, is worthy of more remarks than one, who says, "I give you your discharge, you damned rascal! I'll work the fifty shillings out of you first." In the first place, it proves that there was no complaint against the person that called for his discharge — it is rather a declaration of general amnesty. In the next place, it is a confirmation of what is alleged, that there was a root of bitterness remaining in the mind of the captain, on account of the original sin  
of the fifty shillings.

[ \* 22 ] \* After entering the port of Dominica, and discharging

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The Ealing Grove. 2 Hagg.

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the cargo, an occurrence took place which is repeatedly charged as an act of desertion. It appears that two men, Carman, and a younger seaman by the name of Falconer, prayed leave of the chief mate, who was then in command of the ship, to be permitted to go on shore in the boat; to which he replied, "by all means, but you must come back by gun-fire in the morning," as Falconer understood it, but, as the second mate describes it, "gun-fire or sunset in the evening," which I think the more probable. Falconer describes their conduct on shore in terms of great apparent truth and sincerity; he says, they went to a place of entertainment, where Carman and he got very drunk; what became of Carman that night he knows not, but he himself slept all night under the table, never heard the gun fire, and if he had, could not have got out, being fast locked in the room; in the morning Carman joined him; they sallied out and met another mariner, named Bryan, who had likewise come on shore the previous day in another boat; they agreed to go to the canteen to see the soldiers; there, again, he says, they adjourned into a grog-shop, where they repeated the excesses of the night before, two of them getting completely drunk, and Falconer, as he describes it, three parts drunk, where they were met by the captain and civil officers, carried before the magistrate, and charged with desertion.

Now, certainly, this conduct of theirs was criminal, and, as such, a just subject of punishment. It was an immoral act, it was a gross abuse of a covenanted indulgence; but as to the crime of desertion, it no more resembles that than it does \*a robbery [ \*23 ] or a murder. They had left all their clothes on board, and made no preparations, and their conduct on shore was the very reverse of what must have been the conduct of men meditating an escape; and if they had suffered a few days confinement, and abstinence particularly from the use of liquors, and had then been sent on board the ship by order of the magistrate, few people would have thought them treated with undue severity, notwithstanding all the indulgence generally shown to the habits of such men, in resorting to the grosser pleasures on shore after the fatigues of a long voyage, the cargo landed, and the ship put into a state of perfect security.

What the conduct of these men before the magistrate was is hardly worth inquiry; they were not in a responsible condition, and what they might say could be deemed little better than the effusions of so much liquor. Falconer is remanded to the ship, to which he professed himself willing to return; the other two were sent to prison; one of them, Bryan, after six weeks' imprisonment, was permitted to return to the ship, at the intercession of the captain; the other was continued for nearly the space of three months, till the ship left

the island, and he was then put on board and brought back to England, not as a seaman, but as a prisoner or passenger, sent under the authority of the magistrate, not being permitted by the captain to resume his connection with the ship, or to perform any work, or earn any wages during any of the return voyage.

It is impossible, I think, not to consider this as treatment [ \*24 ] extremely harsh, — to be shut up in the \*loathsome prison of a very limited island, fed scantily with wretched and unwholesome fare, (for which, nevertheless, he was to pay at the rate of near a shilling a day,) affected in his health by such confinement, and with hardly any society but an occasional visit from some of his associates belonging to the ship. I think it is extremely difficult to find a sufficient justification for such treatment. Two justifications are attempted — one is, that he himself refused to go on board the ship during the whole of this time, and that he preferred the *squalor carceris*, with all the discomforts attending it in this warm climate, to the ordinary course of his employment, as a free mariner, on board an English vessel. It would argue such incredible perverseness of mind, such a contradiction to all natural feelings, that hardly any evidence could be admitted to substantiate it; but, in fact, the evidence inclines strongly the other way. He is proved to have declared his wish to be restored to the vessel; and, in fact, the turn of the evidence on the part of the captain is rather to show that it was the captain himself who opposed his return. A more favorable season of the year was coming on, when the expense of a mariner could be better spared, and the obnoxious fifty shillings recovered by that act of parsimony. It was, besides, in the power of the magistrate, at the instance of the captain, to have sent him on board without at all consulting him, as is the usual practice in such distant colonies where seamen prove refractory; it must have been by an understanding between the magistrate and captain, that this remedy was not

[ \*25 ] applied in the present case, and this seaman left to \*languish in a prison, instead of being usefully employed on board the vessel to which he had committed himself.

But another justification is resorted to, that the captain had given a bond, with a penalty of 1,000*l.*, for leaving any of his mariners upon the island; for it seems that it is the law of Dominica, that a captain is compellable to give such a bond, and that this captain had been so compelled. Now, I hope I do not violate the respect due to the authority by which this privilege has been conferred, when I observe, that its misapplication may produce very inconvenient consequences; a penalty of 1,000*l.*, which was the penalty of the bond given, seems rather, on the part of the island, to invite desertion, for

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The Mary. 2 Hagg.

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it is a sum very greatly exceeding the possible expense which the island could incur. By one or more mariners being left upon it, their island treasury would be a gainer by it. In the next place, it may bear hard upon the captain, by imposing upon him a disability of discharging any seaman, however refractory; and as to its pressure upon the seamen themselves, I think the facts that I have stated respecting this unfortunate mariner sufficiently show the oppressive severity with which the exercise of such an authority may be inflicted.

It appears, that the magistrate sent this man on board, to return in her to England, and he could only be sent by the magistrate to that ship, as a mariner belonging to that ship; in that character he is reinstated, for he had no power to send him in the character of a prisoner. However, in the latter character he seems to have come to England, not being permitted to do any duty on board, though \*extremely willing and desirous, having so expressed [ \* 26 ] himself to more than one person; and his sufferings are completed by his returning penniless to England, after having been compelled to pay for his miserable subsistence in the prison, for the space of near three months.

Upon the whole, I am not conscious that I can do more than direct a very moderate compensation for the sufferings of this individual, when I pronounce him entitled to the wages for which he sues, together with the necessary expenses incurred in recovering them.

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MARY, Ardlie.

June 20, 1826.

Motion for leave to enter an appeal, in a suit for wages, from a decree of the Vice-Admiralty Court at the Cape eighteen months before, refused; no sufficient circumstances being stated.

THIS was an application to enter an appeal, in a cause of wages, from a decree of the Vice-Admiralty Court at the Cape of Good Hope; the decree was made on the 3d of December, 1824.

Joseph Murz, in his affidavit, deposed:—"that he was a native of Lisbon, and was hired in January, 1824, and signed the ship's articles as a mariner (at the rate of 4*l*. 10*s*. per month,) on board the above ship for her voyage to London; that the ship sailed with cargo, touched at Madras, and on the 9th of July, 1825, was wrecked near

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The Mary. 2 Hagg.

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the Cape of Good Hope ; that while in the service of [the ship, the deponent was dangerously ill, and, so continuing, was unable to assist the rest of the crew in saving the cargo and materials ; [ \* 27 ] that by the end of October \* the rest of the crew had succeeded in saving a great part of the cargo, most of the rigging, sails, and provisions, and the hull of the ship, which were ultimately sold, and the proceeds of the hull, rigging, and sails, were more than sufficient to [pay the whole of the wages of the deponent and his shipmates ; but that the same not being paid, a suit was instituted at the Cape, in which wages were pronounced due as far as freight had been received, namely, till the arrival of the ship at Calcutta ; that the deponent, being thereby deprived of any relief, entered on board The Vansittart, and continued in her service till her return to London, about three weeks ago ; that the owners of The Mary having since refused payment of his wages, the deponent is now informed, that, owing to some trifling informality in the proceedings of the professional persons employed by the mariners at the Cape, in not interposing an appeal, his only remedy is to apply to this court for its permission to appeal." The affidavit further stated the good conduct of the mariner while in the service of The Mary.

*Addams*, upon this affidavit, moved on behalf of the mariner, and referred to The Neptune, Clark,<sup>1</sup> to show that the mariner, if the appeal were entertained, would be entitled to a decree for wages to the time of the wreck.

*Jenner* and *Lushington* for different part-owners. The owners and underwriters have settled the whole accounts. There was no previous intimation of an appeal ; and if it were now admitted, it might lead to endless litigation, and the owners be involved in great [ \* 28 ] \* loss. When the vessel was in distress, the conduct of the crew was highly reprehensible.

PER CURIAM. I do not think that the circumstances laid before me are sufficient to justify a permission for entering an appeal ; and I reject the application.

Motion refused.

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<sup>1</sup> Vol. I. p. 227.

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The Betsey Caines. 2 Hagg.

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BETSEY CAINES, Wilson.

June 27, 1826.

In a cause of collision the protest of the master of a foreign vessel, which, being in distress, was in tow by the vessel run foul of, is *res inter alios acta*, and not admissible evidence where no necessity exists. The court may order compensation for consequential damage.

THE Minerva, while assisted by The Flora in towing a foreign vessel into Yarmouth, was run down by The Betsey Caines. In the protest by the foreign master (attested by two of his seamen,) it was stated, "that he saw a large brig (The Betsey Caines) running before the wind towards them; that he hoisted a lantern and repeatedly hailed her; but that she continued her course, ran foul of the smack Minerva, and sank her." The owners of The Minerva brought a suit for the collision, and annexed a copy of this protest to the third article of their libel. The fourth pleaded, "that the smack was of 48 tons burden, of the value of 500*l.*, and that at the time of the collision she had a cargo of fish worth 100*l.*, and other effects on board worth 75*l.*; that the owners sustained a further loss of 50*l.*, as she could not complete the salvage; and that it had been agreed between the two smacks that 50*l.* should be given to The Minerva, as being the first employed; but that as The Flora singly \*completed [ \* 29 ] the service, this was a set-off, and the two smacks having shared equally, The Minerva was, by being run down, deprived of the benefit of the agreement."

Jenner and Pickard objected to these articles of the libel. The protest is quite inadmissible; it is *res inter alios acta*; and there is no instance in which this court has inquired into consequential damage.

*Lushington and Dodson contra.* Unless the protest is allowed, we shall be entirely deprived of any evidence from the master and seamen of the foreign ship; we could not detain them for examination. The Minerva, at the time she was run down, had performed one day's service, and was in the act of earning the sum alleged, which has been called consequential damage, but which may be regarded as *quasi* freight.

## JUDGMENT.

LORD STOWELL. This has been a very unfortunate adventure. The smack was performing a very useful service to a foreign vessel, and in the performance of that service was run down and destroyed.

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The Aviso. 2 Hagg.

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If the effect of that collision had been to destroy the persons on board the smack, it would be a reason for admitting evidence not strictly and technically legal; but none of the crew were lost; all survived, all are capable of being witnesses. A case of necessity then does not exist, such as might induce the court to open a door for the admission of any evidence; and since it does not, I should be unwilling to allow a protest to be introduced that has been pro-

[ \* 30 ] perly described as *res inter alios acta*; I therefore reject the protest, and the article that pleads it.

There is less weight in the second objection. No authority has been mentioned by which the court might be induced to consider itself excluded from entertaining a question of consequential damages; and I cannot persuade myself that the jurisdiction is so limited in this respect as the argument would suggest. Besides, this is not a mere claim for consequential and probable advantage only, for the smack was actually in the pursuit of earning that which it had been stipulated she should receive. I reject the third, but admit the fourth article of the libel.<sup>1</sup>

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On 3d of July, 1827, the court, assisted by Trinity Masters, pronounced, that the owners of The Betsey Caines were entitled to be dismissed from the action.

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[ \* 31 ]

\* Aviso, Da Silva.

June 27, 1826.

The principles of joint capture in prize cases apply to vessels associated in the capture of ships engaged in the slave-trade; therefore, where the actual capture was made by one of two vessels associated for such purpose, the other, which had joined in the chase, and rendered subsequent assistance, held entitled to share in the bounty for the slaves and in the proceeds of the ship, stores, and cargo.

THIS ship, under Brazilian colors, and laden with four hundred

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<sup>1</sup> May 15th, 1827. In The Yorkshireman, Forman, a case of collision, in which it was alleged that a fishing-smack was run foul of by the steamboat while the smack was on a voyage from London to Norway to receive a cargo of lobsters, and that from her damage it became necessary to hire another smack for that purpose; the court (having condemned the owners of The Yorkshireman in the amount of repairs, and in

slaves, was captured on the 26th of September, 1824, by H. M. S. Maidstone, Capt. Bullen, in company with H. M. S. Bann, Capt. Courtenay, and was condemned at Sierre Leone under proceedings instituted by Capt. Bullen, in his own name only. Capt. Courtenay, being afterwards apprised that his ship was not named in the decree, and that it was Capt. Bullen's intention to resist the claim of The Bann to share in the grant of bounty, memorialized the treasury; and he then was informed that the claim must be established in the Court of Admiralty. A monition was then issued against the commander, officers, and crew of The Maidstone, to show cause why The Bann should not be admitted a joint chaser and seizor; and in support of the claim an allegation was offered, pleading in substance:—"that, in March, 1824, Capt. Courtenay being instructed by the admiralty to put himself under Capt. Bullen, off the coast of Africa, for the purpose of preventing slave traffic, was on the 25th of May ordered by Capt. Bullen to place himself under his command; and on the 25th of September, directed The Bann to keep company with The Maidstone during the night; that on the next morning at day-break a strange sail was discovered distant ten or twelve miles from The Bann, and, a signal being made by her to The Maidstone, both ships went in chase; but The Maidstone being a superior sailer, passed The Bann, and about half-past nine A. M. took possession of The \* Aviso, The Bann being in sight and in chase, distant between two and three miles, and fast coming up; that Capt. Courtenay was then sent to the island of St. Thomas, and was thereby precluded from claiming as a joint seizor; that the two ships were associated and engaged in the same service; that The Bann was in chase, in sight, and fast coming up when the seizure was effected, and was therefore entitled to share in the proceeds and in the bounty-money payable for the slaves."

*Lushington* and *Dodson* opposed the allegation.

The circumstances of the capture are not denied; but the principle applicable to war captures cannot operate in cases where there is neither intimidation nor encouragement; for what slave-ship can resist a frigate? The labor and trouble fall upon the actual captor; he alone is responsible to the owners if a seizure is wrongfully made. Constructive assistance is the foundation of the plea; and that can-

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costs) after argument, directed a reference to the registrar and merchants to report the amount of freight paid to the vessel substituted for the fishing-smack, in order that the same might be allowed as consequential damage.



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The Aviso. 2 Hagg.

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not avail. Bounty under the 1 & 2 Geo. IV. c. 99, s. 6,<sup>1</sup> resembles as nearly as possible head-money, to which the actual captor is alone entitled.

*Jenner and Phillimore, contra.* Captures whether in war or peace are not distinguishable as respects a question of this description. The Bann was associated with The Maidstone, and directed by Capt. Bullen to chase. Bounty-money for the capture of slaves has not been assimilated by the legislature to the principles on which head-money is granted; but it more resembles forfeiture under the revenue laws. The whole tenor and instructions of the order in [ \* 33 ] council of the 14th of October, 1816, which \* has frequent reference to joint capture, recognize the right of joint seizors and captors to share in the distribution of the bounty; and there is nothing to take the present case out of the general principles of intimidation and encouragement applicable to association.

\* JUDGMENT.

LORD STOWELL. This is a case very properly brought before the court for its judgment; for though somewhat like cases may have preceded it in point of fact, yet as none of them have been subjected to a decision, no principles have been established by any authority respecting the interest concerned. The interests in the present case are asserted to be those of a joint capture; and the circumstances under which they are stated to arise are the following: — H. M. S. The Maidstone, commanded by Capt. Bullen, was sent, under orders from the admiralty, to cruise on the coast of Africa, but sent there for the express purpose of capturing all vessels carrying on the slave-trade, in breach of the treaties subsisting between his Majesty and foreign powers, and thereby subjecting themselves to British capture and confiscation. This was the great and peculiar object of Capt. Bullen's mission. No other object of the mission appears in the orders on which he sailed; and he was on the station, and so employed, when the present transaction took place. In the early part of the year 1824, orders were given by the admiralty to Capt. Courtenay, commander of H. M. S. Bann, to take his vessel to the coast of Africa, and there put himself under the command of Capt. Bullen.

[ \* 34 ] This, I think, cannot be considered as a mere general \* order, but must be deemed a special order, pointing to their employment in suppression of the illegal slave-trade; for that was the

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<sup>1</sup> See 5 Geo. IV. c. 113, s. 68.

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The Aviso. 2 Hagg.

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especial appointment of Capt. Bullen, who was appointed to that station for that specific purpose, and, as far as appears, for no other; and, therefore, in all fair construction, H. M. S. Bann being ordered to that station, and being put under the orders of Capt. Bullen, must be deemed to be sent out to coöperate in the same purpose for which that officer was employed, that is, of capturing ships illegally concerned in carrying on the slave-trade.

It appears, that, in prosecuting this design, after having put himself under the orders and instructions of Capt. Bullen, Capt. Courtenay had examined a Portuguese ship, which was suspected of carrying on that trade, but which, at the time of the inquiry, had no slaves on board; he is afterwards sent off on a slave-capturing expedition by Capt. Bullen to examine the coast for that purpose, from Cape Coast Roads to the river Cameron, with orders to return and join, after examining the cruising ground off St. Thomas. This order was obeyed, and The Bann received a further order to join The Maidstone, which she did, and continued in company for the night, and at day-break she discovered a strange ship, nearer to herself than to The Maidstone, to which she gave chase, after making a signal to The Maidstone to announce what she had observed, and what she was then doing. The Maidstone immediately joined in the chase, and, by the powers of superior sailing, outstripped her consort, and approached and captured the vessel or slave-ship, containing four hundred slaves; The Bann soon after came up, and recognized her as "the very same vessel which she had examined a few [ 35 ] days before, when she was empty of any cargo. The Bann then offered her services in any way in which she could be useful to the securing the vessel, and bringing her into port, and was actively employed in carrying the hawser, by which the captured vessel was to be towed into port; The Maidstone declined the acceptance of any further service, and carried the vessel to Sierra Leone, where she was proceeded against before the commissioners, in the name of the actual captor only, and by their authority adjudged to his vessel.

An application is now made to this court, according to the act of parliament, on behalf of The Bann, as a joint captor of the vessel, and, as such, entitled to her proportion of the value of the ship, stores, and a proportion of the bounty-money, likewise merchandise, if any.

Upon this statement of facts, it is impossible to describe a more complete continuity of association, short of actual capture, from the beginning to the end of this transaction. Without retracing all the preceding proofs of association betwixt these two vessels, I content myself with observing, that The Bann was the first discoverer of this

vessel, and communicated the discovery to The Maidstone, and was only prevented by the superior sailing of that vessel from being the actual, and even sole captor; that after the capture she gave assistance, and offered more. Under all these circumstances, is she entitled to be considered as a joint captor, with respect to the ship, and merchandise? I venture to say that I see no sufficient reason why

this ship should not be admitted to a participation in the [ \* 36 ] benefit arising from them, for she certainly \* would be so admitted upon the most temperate application of that law which the Court of Admiralty is in the habit of applying; and I must presume that the legislature, in conferring the jurisdiction on the Court of Admiralty, meant it should apply its own principles upon the cases submitted to it, or at least as far as it was proper to apply them. It did not mean that the Court of Admiralty should frame a system entirely new, and peculiar to this new subject, but should determine the cases submitted to it upon its own principles, with such accommodations as it might be proper to apply in cases, though not exactly the same, yet bearing much affinity to them. The persons acting in contravention to the treaties are to be considered as the enemies of the contracting parties, and their property confiscated as such by the captor, their persons only being left to such measures of vindictive justice as their respective countries may think fit to inflict. Here is an undoubted *animus capiendi* — here is a specific endeavor — and here is to be fairly added the increased terror of the enemy, (for enemies, I repeat, they are to be considered, under the treaties,) produced by the apparent increase of hostile force.

A distinction is attempted with respect to the produce of the bounty-money. The latter, it is said, approaches near to the case of head-money, which has usually been treated as vesting in the actual captor alone, and not giving an interest to any who are not concerned in effecting the actual surrender; but that is bounty proceeding out of the public purse, vested in the captor by act of parliament, and

has, therefore, received a very limited construction under the [ \* 37 ] words of that act; \* but this bounty is a representation of the property captured, being a reduced valuation of the slaves taken, the *res ipsa* of the property captured approaching much more closely to the nature of cargo. I think, therefore, that it is to be considered as liable to the same distribution. I will not say, that this ought to be carried possibly to the extreme length to which the principle of capture, by mere or accidental sight, has been carried in prize-law, and which it has not been the policy of later times by any means to favor.

If this case at all approached to a claim of that nature, I should

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The Aviso. 2 Hagg.

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not venture to give it a favorable reception ; or, at least, I should not without great and cautious deliberation, presume to transplant such a principle into this new subject. But this is a case of a very different kind : here is association and a high degree of coöperation throughout in an act belonging to that service to which these ships were specially appointed.

Upon these grounds, I am clearly of opinion that the claims of The Bann ought to be admitted. In the arguments, use has been made of the general revenue acts to justify this conclusion ; but I shall be content to use those arguments without pressing them more particularly, because they belong to a different system less familiar to us in construction and administration, than that in which we are in the habit of administering, and admit of an attention to some different considerations. The only act to which I shall think it necessary to allude to expressly, is the act of the 1st and 2d of his present Majesty, c. 99, which confers a jurisdiction on the Court of Admiralty, and which seems to have in view a case similar to the present, for one hardly \* can see any other subject upon which [ \* 38 ] it could operate ; since a case of actual and entire joint capture could not properly be a subject of any doubt, as the commissioners would naturally, themselves, pronounce in favor of both ; and it could scarcely be in any other than such a case as this, not amounting absolutely to an actual joint capture, that a resort to the Court of Admiralty would be found necessary. I think, that, in conferring this jurisdiction upon the Court of Admiralty, it was intended to give that court specially a jurisdiction of joint capture, leaving it to apply the principles of joint capture cautiously and temperately, and with such reserves in that application as a new subject would properly require.

Upon the whole, I admit the allegation to proof :<sup>1</sup> if proved, it will

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<sup>1</sup> March 28, 1827.

A vessel, which had chased a slave-ship into a situation from which she could not escape, and then (being herself forced by a leak to abandon the chase) informed the capturing vessel thereof, held not entitled as a joint captor.

In The Orestes a question arose on the capture of a Spanish brigantine, with 265 slaves on board, taken into the Havanna by Lieut. Bennett of H. M. S. Speedwell, where the court of mixed commission condemned the brigantine, and decreed the slaves to be emancipated. A monition having issued out of this court against Lieutenant Bennett to show cause why Lieutenant Lowe, his officers and crew, should not be pronounced joint captors and seizors of the brigantine, and entitled to share in the bounty money for the slaves, his interest was denied ; and it was then propounded in

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The Aviso. 2 Hagg.

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give the party an interest not only in the bounty, founded upon this moderate valuation of the slaves, but likewise in a proportion of \* the ship, her stores, and every thing in her that

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an allegation, of which the six first articles, in substance, pleaded:— That H. M. schooner Union, Lieutenant Lowe, by an order from Vice-Admiral Sir Lawrence Halsted, commander-in-chief on the Jamaica station, placed herself under the directions of Captain Hobson, of The Ferret, by whom he was instructed (on 17th December, 1825) to fall in with and put himself under the orders of H. M. schooner Lion, Lieutenant Smith, employed in the suppression of piracy and slave trading. The seventh pleaded:— That on the morning of the 26th of February, 1826, The Union, being thus associated with The Lion, and in company with her on a cruise off Key Sal, to the northward of the island of Cuba, the wind blowing from about N. E., chase was given to a strange sail, a brigantine under Spanish colors, to windward, which shortly afterwards made all sail towards the coast of Cuba; that the chase was continued during the whole of the day, but they lost sight of her at night. On the 27th they resumed the chase till past 8, P. M., when, owing to the night and the weather, they again lost sight. The 8th and 9th:— That, to intercept her passage to the Havana, Lowe bore up for Key Sal, and at daylight on the 28th again discovered the brigantine, but The Lion was not then in sight; that The Union instantly recommenced the chase, and continued it during the day, and about 7, P. M., they entered the S. E. end of the gulf of Providence, when the chase was continued northward up the gulf close to the shoals along its western side; that about 9, A. M., on the following morning, (1st of March,) The Union having got off from a shoal on which she had struck, the brigantine being then out of sight, and from her situation, and the course she was steering on the preceding evening, there being no outlet to the westward, and it being impossible for her, as the wind then was (N. E.) to get away to the eastward without being captured by The Union, Lowe felt convinced that the brigantine had run ashore on a shoal on the western side of the gulf, called the Grass Key; that finding The Union leaky, and not knowing what damage she might have sustained, he proceeded to Nassau in New Providence, where she arrived at 3, P. M., when he immediately communicated to Lieutenant Bennet of The Speedwell, the whole of the circumstances attending the chase, and his belief that the brigantine was on the Grass Key. The 10th:— That on the morning of the 2d of March, Captain Hobson, with The Ferret, arrived at Nassau, when Lowe communicated to him the same circumstances. 11th:— A letter from Lowe to Hobson, at the close of which was, "I beg leave to say that it is my opinion the chase must have run ashore on the Grass Key." 12th and 14th:— The official order of Hobson for The Union to sail in search of The Lion, to accompany her to Jamaica; and that Hobson, having directed The Speedwell to go in search of the brigantine, in pursuance of their respective orders, the two schooners left Nassau on the 4th of March, and proceeded together down the gulf of Providence; that Lieutenant Bennett, following the directions and information of Lowe, proceeded in The Speedwell to Grass Key, where he captured the brigantine.

*Jenner and Phillimore* opposed the allegation.

*Lushington and Dodson*, *contra*.

**PER CURIAM.** The claim of joint capture cannot be supported. I reject the allegation, but allow Lieutenant Lowe his costs.

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The Minstrel. 2 Hagg.

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constitutes her value. The allegation expressly, \* and, in [ \* 40 ] my opinion, justly, involves them all in the same claim, although the bounty-money has been almost the sole subject of discussion; upon all analogy, if good with respect to the bounty-money, it will, *à fortiori*, attach upon the other.

NOTE. This claim was not further opposed.

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MINSTREL, Arkcoll.

November 29, 1826.

Where by the articles wages were not payable till the cargo was discharged, (within a limited time,) and where, after an arrest, the wages were paid within such time, the owners held liable to the costs of such arrest, they having refused to pay the mariner at the same time as the rest of the crew, but tendered him a less sum than was due "in full of his wages."

THIS was an application for costs.

The ship's articles stipulated, that no seaman should be entitled to his wages until the ship was discharged of her cargo, provided it were done within twenty days after her arrival at the port of delivery. On the 23d of June, 1826, the vessel reached the port of London, and on the next day the crew were discharged, the cook being paid 1*l.* on account of his wages: on the 26th the rest of the crew were paid their wages. The cook twice applied for the balance due to him, namely, 17*l.* 2*s.* 6*d.* which was refused; the owners offering him 10*l.* "in full of his wages." This the cook declined \* to [ \* 41 ] accept; and on the 3d of July he caused the vessel to be arrested in a suit for wages. On the 11th, the discharge of the cargo was completed, and on the following day the balance of wages was paid to the cook's proctor, the question of the costs of the arrest being reserved.

*Lushington*, for the owners. — The seaman's wages were paid agreeably to the articles: he was, therefore, not justified in his arrest of the vessel. *White v. Mattison*<sup>1</sup> differs from the present case: the

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<sup>1</sup> 2 Starkie, N. P. 325.

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The Rainger. 2 Hagg.

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form of action distinguishes it: and the plaintiff there sued upon the undertaking of the defendant.

*Jenner, contra*, was stopped by the court.

PER CURIAM.

It appears on affidavit that the crew were generally discharged on the 24th of June, on which day this man was paid 1*l*. on account, and that on a subsequent day the owners, having paid in full the rest of the crew, offered to pay him 10*l*. "in full of his wages," but which he declined, and arrested the ship. These facts put the present case out of all doubt, and I allow the costs.<sup>1</sup>

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[ \* 42 ]

THE RAINGER, Laing.

January 31, 1827.

The Court of Admiralty cannot, in a case of salvage, allow charges for repairs.

THIS collier, bound from Newcastle to London, went on shore near Wells, on the coast of Norfolk. She was promptly assisted: the leaks were caulked, and ultimately the vessel and cargo were carried into Wells, where the necessary repairs for the completion of her voyage were effected. The salvors, considering that the owner, in the general settlement of the account at Wells, had failed to remunerate their services, and also to discharge a demand of 17*l*. to Mr.

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<sup>1</sup> December 13, 1827.

The payment of wages after the arrest of the ship is an admission of the justice of the claim, and renders the owners liable to the expenses of the warrant and arrest.

In *The Thomas Handford*, Sawyer, the wages were paid after the arrest of the ship; but the owners denying their liability to defray the expenses of the warrant and arrest, — inasmuch as the men had quitted the ship in direct disobedience to the master's orders, and that the wages were not due at the arrest of the ship, — gave bail to the action under protest: but the court after argument, overruled the protest, and allowed the seamen's expenses, observing, that as the wages had been paid, the court was entitled to assume that the justice of the demand was admitted.

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The Zephyr. 2 Hagg.

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Parker for caulking and other temporary repairs, previous to the removal of the vessel to Wells harbor, arrested the vessel and cargo in a cause of salvage.

On this day, *Jenner*, for the salvors, submitted that this demand of 17*l.* should be allowed by the court, inasmuch as the repairs, for which that sum was due, were so mixed up with the salvage, that they could not be separated, and ought to be recovered together.

*Addams, contra.*—These services and demands were paid under the denomination of tide work. The court has no authority to decree payment of a shipbuilder's account.

## PER CURIAM.

The payment of this bill must be disposed of by other authorities.<sup>1</sup> This court cannot decide upon the demand. For the salvage service I give 100*l.*, and costs.

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ZEPHYR, Arrowsmith.

[ \* 43 ]

February 17, 1827.

Where vessels sail as consorts, and under an agreement to render mutual assistance, the court will not entertain a claim of salvage for services rendered by one to the other.<sup>2</sup>

This was a claim of salvage for services rendered by The *Rosalind* to The *Zephyr*, and asserted to have continued for seven days. Separate actions were entered on behalf of the master and crew, and also on behalf of the assignees of the late sole owner of The *Rosalind*; the assignees alleging that the whole of the insurance (9,500*l.*) were forfeited by the deviation of The *Rosalind* from her course by assisting The *Zephyr*; and that, in consequence of such assistance, The *Rosalind* lost a month on her voyage, whereby certain losses and expenses were occasioned to the bankrupt's estate.

In reply to these claims it was set forth in the act on petition, "that The *Zephyr*, of 290 tons and eighteen men, sailed on the 29th of Oc-

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<sup>1</sup> See Abbott on Shipping, p. 109, s. 11, (5th edit.)

<sup>2</sup> [As to salvage claims by vessels sailing in company, see The *Ganges*, 1 Notes of Cases, 87; The *Herman*, 4 C. R. 228; The *Harriet*, 1 W. Rob. 439; The *Swan*, Id. 70.]



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The Zephyr. 2 Hagg.

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tober, from Honduras, (with a cargo of mahogany, logwood, and other goods,) in company with The Rosalind and The Sarah; that it was agreed between the masters of these vessels that they should sail in company, in order to render mutual assistance, and protect each other against pirates, it being the usual custom of vessels in that trade so to do; that these vessels kept together till the 3d of November, when The Sarah parted company; that The Zephyr and Rosalind continued together, The Rosalind answering the signals which had been agreed upon, and following The Zephyr at night until the 8th, when The Rosalind being out of sight, The Zephyr wore to the S. E. in search of her, and after some hours joined her

[ \* 44 ] again, and they reached the straits of \* Florida together on the 19th, when at midnight The Zephyr was run foul of "by an American vessel." The reply (after setting forth the damage to The Zephyr, and the services of The Rosalind, and that Captain Arrowsmith, from the state of The Zephyr, thinking it advisable to proceed for port Nassau, and the wind being contrary to a passage through the straits of Florida, Captain Antrim consented to follow The Zephyr through the north-east Providence Channel, and in that direction into the Atlantic by the Hole-in-the-Wall, and that the vessels continued in company until the 23d, when being within a few miles to the northward of the Bury Island, and the wind coming more from the eastward, Captain Antrim altered his course, and proceeded as at first determined through the straits) alleged, "that the service rendered in lying by for a few hours, and lending a few men for a short time on two days, was not a salvage service, but such as every ship's master and company ought to render to any other ship sailing in company; and further, that The Rosalind did not deviate from her course, and that a forfeiture of the insurance had not been incurred."

The agreement and usage were denied; and it was alleged "that The Rosalind quitted The Zephyr solely because both captains considered The Zephyr in safety; that Captain Arrowsmith had admitted the great services of The Rosalind, and declared that if the present action had not been commenced, he would himself have compensated Captain Antrim, and accompanied him to the consignees of the cargo to procure him remuneration."

The usage for vessels in the Honduras trade to sail for [ \* 45 ] England, under an agreement to render \* mutual assistance in case of necessity, as well as for protection against piracies, was deposed to in the affidavits of Captain Arrowsmith, of the chief mate, and others of the crew of The Zephyr, and also by a master-mariner, who had been constantly employed in the trade for

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The Zephyr. 2 Hagg.

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five years; and who further stated, "that in general the homeward passage was by the straits of Florida, but that the course varied, according as the wind and other circumstances might direct; and that at the fall of the year he should have chosen the north-east Providence Channel in the event of finding little current in the gulf." And two underwriters also deposed, "that the choice of a passage was discretionary with the master of the vessel insured; and that they should not consider an insurance forfeited were a vessel to pursue one course rather than another." The Zephyr was sold at Nassau for 500*l*.; and her cargo, there estimated at 3,500*l*. sterling, was freighted on to this country. Some silver bullion, of the value of 1,000*l*. consigned to London, was brought home in The Rosalind, to which vessel it was transhipped when she quitted The Zephyr.

*Lushington*, for the salvors. The agreement is vague and general; it was of no binding effect, for The Sarah sailed away. The strong fact is the admission of Captain Arrowsmith, that if the action had not been entered, he would have exerted himself to have obtained a remuneration for The Rosalind.

*Jenner*, for the assignees.

*Arnold* and *Dodson*, for The Zephyr. We do not deny that the assistance was advantageous to The Zephyr, and that it may have been prejudicial to The Rosalind; but the latter was bound under the \*agreement of companionship to render it. The devia- [ \* 46 ] tion of The Rosalind was not such as to incur a forfeiture of the insurance.

*Phillimore*, for the consignee of the bullion.

#### JUDGMENT.

**LORD STOWELL.** These vessels sailed not only as consorts, but as consorts under a special agreement to give mutual protection. The contract was made as a security against a common danger; and it was possible that such a contract, which promised benefit to all the parties concerned, might prove injurious to one; but they took it for better or for worse. The results might be various; it might happen that neither vessel would sustain any misfortune, nor require any assistance; or it might happen that one might fall into misfortune, and be entitled to aid from the other vessels with which she was associated. Of such an agreement each ship enjoys the benefit; for the one that renders assistance has the assurance, that if any calamity

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The Zephyr. 2 Hagg.

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should happen to her she would reap the benefit of the mutual stipulation. It turns out, but that is quite a matter of accident, that The Zephyr is the vessel that requires assistance, and she enjoys the security and receives the benefit to which she was fully entitled by the contract.

I am informed by the gentlemen of the Trinity-House, whose attention has been occupied upon this case, and who are well experienced in contracts of the nature in question, that it is agreeable to well-established usage for vessels in the Honduras trade to sail together on understandings of this sort, and that such agree-  
[ \* 47 ] ments are supported \* by general convenience and benefit.

The gentlemen perfectly concur with the court, that the delay occasioned to The Rosalind by accompanying The Zephyr after her accident, (even putting the agreement out of consideration,) is not sufficient to maintain a demand for salvage. The assistance clearly does not continue beyond the fourth day, for on the 23d of November The Rosalind resumes her original course. Nor does it appear that the deviation would vitiate the insurance; the homeward course from Honduras, as far as respects the policy of insurance, is left optional, and the propriety of adopting one passage or the other depends upon the state of the wind, and other circumstances.

That the master of The Zephyr made use of the expression — that if The Rosalind had not entered an action of salvage, he would have done his utmost to have obtained from his owners a remuneration for her services — cannot be carried further in this case than a hope that The Rosalind would receive an honorary acknowledgment for her prompt attention.

As to the two boxes of unstamped bullion, the freight upon this part of the cargo has been received; it was paid at Honduras before The Zephyr sailed; and, after her accident, the boxes were removed for the greater advantage of time, in order to secure an earlier arrival in this country. I shall certainly dismiss this claim; and the only difficulty is the question of costs. A great deal more has been done in this suit than was necessary, and the court is always anxious to discountenance experiments; but considering that the owner  
[ \* 48 ] of The \* Rosalind is a bankrupt, I shall not accompany this sentence with costs.<sup>1</sup>

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<sup>1</sup> March 5, 1828.

*Quære.* Whether if a custom to render mutual assistance be established, it would exclude a claim for salvage.

In The Margaret, Kay, — in which a claim of salvage (for assistance rendered in

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The *Atlas*. 2 Hagg.

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ATLAS, Clark.

February 27, 1827.

The Court of Admiralty has an undoubted jurisdiction over bottomry bonds, which are founded upon sea risks, and defeasible by the destruction of the ship in the course of her voyage; but the court—inclining that a bond, absolute and without dependence on the accidents of the voyage, was not subject to its cognizance,—dismissed a suit on such bond; the more willingly as questions of mercantile practice were involved more fit to be decided by a reference to merchants.<sup>1</sup>

This was a case of bottomry promoted by Fletcher, Alexander & Co., agents of Messrs. Alexander & Co., of Calcutta, the holders of a bottomry-bond, against James Inglis and Robert Spankie, the executors of the will of Patrick Chalmers, deceased, whilst living the sole owner of *The Atlas*.

The bond was of the tenor following:

\* Know all men by these presents, that I, William Clif- [\* 49] ton, now residing in Calcutta, master of the ship *Atlas*, of the burthen of 411 tons, am held and firmly bound unto James Young, Thomas Bracken, [and others,] of Calcutta, merchants, carrying on business together under the firm of Messrs. Alexander & Co., in the penal sum of Sicca rupees 132,000 of lawful money of Bengal, for the payment of which, well and truly to be made unto the said James Young, &c., their attorneys, heirs, &c., I hereby bind myself, my heirs, executors, and administrators, firmly by these presents. Sealed with my seal. Dated this 12th of March, 1824.

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Davis' Straits by one whaling ship to another, both vessels belonging to the same owner) was opposed partly on the plea, "that it was an invariable and immemorial custom in the Greenland fishing service for the masters and crews of vessels engaged therein mutually to render assistance to each other without remuneration,"—the court (Sir Christopher Robinson) observed: I forbear to advert to the custom that has been set up, as the evidence is not specific on that point, either on one side or the other. I am, therefore, disposed to leave that matter untouched, and without prejudice to future cases. I shall decide this case on the ground,—that no service was rendered, and consequently no salvage is due. The court will be cautious not to encourage vague pretensions in a trade of this kind. I dismiss the demand.\*

*Lushington* and *Salisbury* for the salvors.

*The King's Advocate* and *Nicholl*, contra.

<sup>1</sup> [Greely v. Smith, 3 Wood & Min. 236; Leland v. The *Medora*, 2 Wood & Min. 92.]

\* See *The Waterloo*, Birch, 2 Dod. 436.

Whereas, the said ship Atlas, bound on a voyage from the port of London, in Great Britain, to Calcutta, and from thence home to the port of London, lately arrived in the river Hoogley on her said voyage, and was there wrecked and sunk, and received great damage, and at a considerable expense was raised and recovered; and whereas, the said William Clifton, being such master and commander of the said ship, now lying in Vrignon's Dock, has been unable to raise and procure on the security of the said ship, or otherwise, sufficient sums of money fully to repair the said vessel so as to enable her immediately to proceed in the completion of her voyage to London; and whereas, for the preservation of the vessel, and to enable her ultimately to proceed on her said voyage, and to complete the same, considerable and immediate repairs were absolutely necessary to be done to the ship, before sufficient funds can be obtained to complete her repairs and refit the ship; and whereas, the said William Clifton hath

[ \* 50 ] taken up and \* received of the said firm of Alexander & Co. the full and just sum of Sicca rupees 66,000 of lawful money of Bengal, for the purpose of such necessary and immediate repairs, and other charges and expenses necessary for the said ship, and of enabling her ultimately to complete her voyage, which sum is to run at *respondentia* on the block and homeward freight of the said ship from the port of Calcutta, on her return voyage to the port of London, or other port in Great Britain, at the rate of premium of twelve per cent. for the said voyage; and for the better security of the said James Young, &c., the said William Clifton hath agreed to mortgage and assign, and doth by these presents mortgage and assign over to the heirs of the said James Young, &c., their heirs, executors, administrators, and assigns, the said ship Atlas and her freight for the said homeward voyage, together with all her tackle, apparel, and so forth. And it is hereby declared and agreed that the said ship, and her freight as aforesaid, is thus assigned over for the security of the moneys aforesaid, taken up by the said William Clifton to run at *respondentia* as aforesaid, and shall be delivered to no other purpose or use whatsoever until payment and satisfaction of this bond be first made, with the premium that may become due thereon. Provided always, that nothing herein contained shall be construed to destroy, or in any manner affect, any lien upon the said ship to which the said James Young, &c., may be entitled for the money so lent and advanced by them as aforesaid. And whereas the said William Clifton has undertaken to the said James Young, &c., that the said ship shall, with all reasonable speed, be fully and adequately

[ \* 51 ] \* repaired for the completion of her said voyage; and, being so repaired, shall, within fifteen months from the date of

The Atlas. 2 Hagg.

these presents, set sail and depart from Calcutta upon and for the completion of her said voyage to the port of London, and, barring the perils and accidents of the sea, shall duly complete her said voyage. Now the condition of this obligation is such, that if the said ship, being fully repaired for the completion of her said intended voyage, shall, within fifteen months from the date of these presents, set sail and depart from Calcutta, upon and for the completion of her voyage to London, and, barring the perils and accidents of the sea, shall duly complete her said voyage, and if the above-named William Clifton shall and do well and truly pay, or cause to be paid, unto the said James Young, &c., or their attorneys legally authorized to receive the same, or to their executors, administrators, or assigns, the full sum of Sicca rupees 66,000, being the principal of this bond, together with the premium which shall become due thereon at the rate of twelve per cent. as aforesaid, at or before the expiration of thirty days after the safe arrival of the said ship in the river Thames, or other port in Great Britain; or, in case of the loss of the ship Atlas, then within thirty days next after the account of such loss shall have been received in Calcutta or London, then this obligation to be void and of no effect, otherwise to remain in full force.

Signed, sealed, and delivered in the presence of J. Thuoult.

WILLIAM CLIFTON. (L. S.)

*Memorandum, 7th July, 1824.*

By our agreement with Captain Clifton, dated 12th March, 1824, it was settled that should we \* have to close our ac- [\* 52 ] count with him for the ship Atlas and stores, with a view to her despatch to Europe, we should write off on the back of this the sum which the said balance of our account might want to complete the sum of 66,000 Sicca rupees, the said balance is on this day Sicca rupees 52,898 14. We therefore hereby acknowledge and agree that this principal amount only, increased by premium twelve per cent., will be claimable on this bond.

JAMES YOUNG, (L. S.)

THOMAS BRACKEN. (L. S.)

The cause came on upon petition and affidavits, when the court delivered the following observations :—

PER CURIAM. Before we pursue the subject of this case any further, I think it fit to interpose a few words respecting an impression on my mind which I think it necessary to be removed before I pro-

ceed in this discussion. It is founded upon an objection *in limine* to the entertainment of this suit, and which appears to me very formidable, if not fatal, and that is, that the bond upon which this suit is founded is not of that species of which this court holds cognizance. This court has certainly an established jurisdiction over bottomry bonds, properly so called. Such bonds are founded upon sea risk, and are defeasible by the destruction of the ship in the course of her voyage, on which account alone the high interest is allowed, and is supported by the established course of this maritime jurisdiction. But this bond is not defeasible by any such casualty. Whether the ship sinks or swims, whether she arrives at her destined port or is lost in the ocean, it makes no real difference in the bond; for the [\* 53] debt, with the accompanying interest, continues in full force, and is only slightly affected as to the time of payment by the event of a total loss. The hypothecation goes no further, and would not go so far if not compelled by the necessity of the latter intelligence, which must be received after the actual loss of a ship. The bond is absolute, without any dependence whatever upon the accidents of the voyage; the debt and the interest thereon must, under any event whatever, be discharged. I therefore entertain a very serious doubt whether, in proceeding upon such a bond, I might not subject this court to the hazard of prohibition.

The definition of bottomry bonds which I find in all the writers that have adverted to the subject, are contracts in the nature of mortgages of a ship on which the owner borrows money to enable him to fit out the ship, or to purchase a cargo for a voyage proposed, and pledges the keel or bottom of the ship, *pars pro toto*, as a security for repayment. It is moreover stipulated, that if the ship is lost in the course of the voyage, by any of the perils enumerated in the contract, the lender also shall lose his money; but if the ship shall arrive safe, then he shall be paid back his principal, and also the interest agreed upon, called marine interest, however this may exceed the legal rate of interest.

In the Roman law, which treats largely of these contracts, it is called *fœnus nauticum*, or *usura maritima*, and the high interest which is permitted, and which is to reimburse the lender, (who in all cases, and not the borrower, is to run the risk,) is therein denominated *periculi pretium*, or the price of the hazard which the lender incurs. Such is a bottomry bond; but this bond contains no such engagement; [\* 54] on the contrary, the borrower runs all risks and answers all misfortune.

The allowance of twelve per cent., which in this bond is permitted to be exacted in all cases, whether of a successful or an unfortunate

voyage, is not a *periculi pretium*, for danger there is none. The bond, then, being the foundation of the suit is the first object of attention; and it would be imprudent to proceed further upon it till this doubt is clearly removed.

On a subsequent day, the court further remarked :—

**PER CURIAM.** When this case was first presented to my view, it seemed to me that it lay rather beyond the jurisdiction of this court, as that jurisdiction is usually exercised on such subjects. This court exercises an undisturbed jurisdiction over hypothecation bonds, and it appears that this bond is so denominated in the East Indies; but it being so denominated there will not make it such, in the view of this court, if it does not pledge the vessel herself for the sole payment of the bond. Here the bond is absolute. In any event that happens to the ship, the money must be paid. It is, therefore, an absolute and indefeasible bond—not an hypothecation bond, at least in the sense which this court applies to that term.

I believe it may be true that some bonds, not exactly conformable to this rule, may have passed by unobserved by the court, in cases where the parties have both of them come willingly before the court, and have not drawn its attention to the phraseology of the bond. Some such may have passed \* without observation. [\* 55] I have no reason to think this has happened frequently; but I believe the fact to be that these bonds are often inaccurately expressed—expressed differently in the style of different countries—but tending to the same point, namely, the dependence of payment upon the safety of the ship. The mercantile capital of England is so universally diffused over the whole globe, and English credit is so well established in foreign ports, that occasions, perhaps, more seldom occur, and a less necessity exists for a recourse to such bonds in English use, than in the commercial transactions of other nations. But such necessities do occasionally exist; and where they do, this practice, coeval with the Roman law, is applied. The existence of such bonds is fully supported by the authority of maritime courts, in every part of the commercial world, as well as of this.

If it be said that the ship is the first pledge in this bond, and, therefore, upon that principle, if it can be so called, the jurisdiction ought to act, I think that is not a principle which will support these bonds. This court, except upon the subject of prize, exercises an original jurisdiction upon the grounds of authorized usage and established authority. The history of the laws of this country shows full



well that such authorized usage and established authority are the only supports to which this court can trust, except in respect to the subject to which I have alluded.

I feel another strong objection to proceeding further in this case ; supposing the question of jurisdiction got over. The transactions are entirely of a mercantile nature — but of a mercantile [ \* 56 ] nature that is almost entirely oriental ; the whole \* demand, from the original outset, commences, and, I had almost said, terminates there. Of such transactions I am a very insufficient judge. What expenses were proper to be incurred there — what enterprises to be undertaken — what allowances to be properly made.

It has been intimated, that no other court possesses a jurisdiction that would grant a relief to the complaining party. Taking that to be the fact, it would not supply this court with authority to proceed ; for this court is not a general receiver, nor is it empowered to entertain derelict jurisdictions. The proper result of such defect would be, what I am strongly inclined to recommend, a recourse to a reference to merchants acquainted with the modes of conducting oriental adventures ; for, as far as I can judge, such knowledge is essentially necessary to a right decision of this case.

The propriety of many of the measures in India is arraigned ; this, it is said, ought to have been done ; that ought not to have been done. The propriety of conduct, therefore, in such affairs, is much more proper for mercantile decision than for one that is merely judicial. I strongly advise the parties to accede to this recommendation, being confident that they would receive much more expeditious and satisfactory justice therein than could be expected in a court which, omitting all other objections to it, would, from the mere doubtfulness of its jurisdiction, be liable to expensive interruptions.

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The cause then stood over for further inquiry and consideration, after which the court proceeded to deliver its final decision.

[ \* 57 ]      \* JUDGMENT.

LORD STOWELL. I have reconsidered this question, and I have to communicate the final result of my considerations upon it. It certainly appears to me to be a case which the powers of this court do not enable me to conduct to any satisfactory result either of jurisdiction or of merits, being very unsettled in the first of these qualifications, and very much out of the reach of legal inquiry in the latter. With respect to the first matter, that of jurisdiction, it at the very first outset occurred to me, as open to a very important doubt,

whether the contract was of that nature which is subject to the established cognizance of this court. The bond is executed in the East Indies, and calls itself an hypothecation or bottomry bond, but it is certainly of a very different nature from bonds which are so estimated and denominated in the proceedings of this court. Having already described the distinctions between them, I shall shortly repeat the description of those distinctions. The hypothecation or bottomry bond known to the civil law, and acted upon with an undoubted authority by this court, is a bond whereby the captain of a vessel, not having any credit in the port, is enabled to obtain money for the repair of the ship, and its equipment for the voyage, upon what is called maritime interest. In the Roman law, in which it was familiarly known, it was called *usura maritima*, or *fœnus nauticum*. The extent or value of this security for repayment was not limited, for it was not certain, but only eventual, dependent upon the safe accomplishment of the intended voyage. If the ship arrived safe, the title to repayment became vested: but if the ship perished *in itinere*, the loss fell entirely upon the lender. Upon that [ \* 58 ] account, the lender was entitled to demand a much higher interest than the current interest of money in ordinary transactions. It partook of the nature of a wager, and therefore was not limited to the ordinary interest; the danger lay not upon the borrower, as in ordinary cases, but upon the lender, who was therefore entitled to charge his *pretium periculi*, his valuation of the danger to which he was exposed. A contract similar to this, upon the cargo of the ship, is called a *respondentia*, but is of rarer occurrence.

Such hypothecation bonds upon the ship are frequent in this court, though, from the diffusion of British capital and credit over every part of the navigable globe, less frequent in British use, in consequence of less frequent necessity, than in the courts of other maritime nations. But the contract, which is the subject of the present contest, is of a very different nature; it is independent of all contingency. The interest is to be paid whether the ship arrives or not: not only the ship, but the whole property of the party, is equally pledged, that upon land as well as that upon sea; and it is pledged, not for the payment of a *fœnus nauticum*, but for an interest not uncommonly given in common transactions in that country. Payment in the different events is expressed in one and the same sentence, whether the ship sinks or swims, with a mere difference in point of time of payment, arising from absolute necessity; and the ship, in either case, is not more pledged than the whole property of the individual, whether upon land or sea, and independent of any casualty. It happens, however, in the practice of that quarter of the world, to

be called an hypothecation bond, but no instance has occurred \* of that denomination in the practice of this court during my long attendance in it, excepting one, *The London*,<sup>1</sup> in which I was concerned as counsel, but which cannot certainly be in any manner considered decisive in the matter of jurisdiction. But Sir James Marriott, my predecessor, did not, as far as any recollection of mine, or as far as any existing notes apply, enter very particularly into the question of jurisdiction; he contented himself with declaring, that, upon the whole, he was inclined to support the bond, being to be executed upon the sea; and that if he was not prohibited he would not prohibit himself.

The proceedings went on under the jurisdiction of this court, no prohibition being moved for. After the execution of the sentence given by the admiralty, the matter came under the consideration of the judges of the Court of King's Bench, in the case entitled *Ladbroke v. Crickitt*.<sup>2</sup> That was an action of trover for the ship *London*, in which a verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench, on a case, stating that the vessel was taken in execution on the 4th of May, 1787, by the plaintiff, as sheriff of Surrey; and on the 24th of May another writ was executed on the vessel by the plaintiff. On the 5th of July, the plaintiff was served with a notice from the defendant, that he, the defendant, as marshal of the Court of Admiralty, was in possession of the vessel

by a writ under seal of that court, at the suit of Atherley [ \* 60 ] and \* others, for a bottomry bond. The judgments under which the plaintiff levied execution were of Easter Term, 1787. On the 8th of November, 1786, George Pasmore had executed an instrument under seal at Cowes, reciting "that he was master and owner, and that the vessel, in the course of her voyage from South Carolina to London, had sustained great damage, insomuch that he was under a necessity, for the safety and preservation of the vessel, to put into Cowes to repair," and reciting, "that the agents of Atherley, and the others in that suit, had expended, in the repairs, 824*l.* 8*s.* 5*d.*, for the due payment whereof, he, Pasmore, agreed that the said vessel, her tackle, &c., should be and remain as security, by way of bottomry." It was further stated, "that he should immediately sail with the said vessel for London, and would pay the bottomry bill on the 8th of May, 1787, either at the port of London, [or at any other port whereat the said vessel should happen to arrive;]

<sup>1</sup> *The London*, Pasmore. July 16, 1787.

<sup>2</sup> 2 T. R. 649.

and he thereby bound his executors, &c., and also the said vessel, in 1,648*l.* 16*s.* 10*d.* for the payment of the sum due, and, further, not to depart with the vessel from London, [or permit her to sail from thence after her arrival there,] till the money should be paid.<sup>1</sup>

Atherley and others instituted a suit in the admiralty court on this instrument, and on the 1st of January, 1787, a warrant issued upon such proceeding from the admiralty court, empowering the defendant, as marshal, to arrest the vessel, and to \*cite all [ \*61 ] those who had any interest therein to answer to Atherley, and the rest, in a cause of bottomry, civil and maritime. On the 1st of January, 1787, the defendant arrested the vessel in the River Thames, and cited all the parties, &c., and was in possession when the plaintiff's executions issued. The case then stated, that on the 16th of July, 1787, the admiralty decreed the ship to be delivered to Atherley and the rest; and on the 22d of November, 1787, a warrant issued to the defendant, as marshal, to sell the ship, (which warrant, it is to be observed, only stated that proceedings had been had in a certain cause of bottomry, civil and maritime, between the parties, in which the court had awarded possession, without stating the grounds of the suit.) By virtue of this warrant, the defendant sold the ship for 980*l.*, which was regularly certified to the admiralty court.

When the case was in the Court of King's Bench, it was contended for the plaintiff, first, that the instrument given to Atherley was not a bottomry bond; and secondly, even if it were, that the Court of Admiralty had no jurisdiction over the subject-matter. But all the judges waived the discussion of the subject of jurisdiction, and contented themselves with deciding the question on the imbecility of the plaintiff's title, declaring that, if he was not entitled to recover, it was immaterial to consider whether the Court of Admiralty had any jurisdiction; and it will appear to any person who reads that report, that the immediate question of jurisdiction received no decision either one way or the other.

It is not within my recollection that any such case has occurred since, at least, none in which the \*objection was [ \*62 ] presented to the court or observed by the court itself, and the question remains in the same undecided state as it was left by the judges of the Court of King's Bench in the foregoing case. Having this authority, which does not decide the question, I had promised myself great satisfaction of my doubts from opinions of two very

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<sup>1</sup> The passages within brackets are inserted from the original bond.

eminent professors of common law, for whose legal talents I entertain the highest respect; but it appears to me, that they have not exactly understood the difficulties under which I labored, and have, therefore, failed in removing them; they most effectually proved the difficulties with which the case would have to struggle within a court of common law. Granting all this, I am by no means satisfied that, therefore, the courts of civil law possess a jurisdiction. They may labor under an equal incompetency, though of a different kind. The civil law courts have no right to usurp an authority, merely because a common-law court does not possess it; it must have a direct and positive foundation. A court of civil law does not claim to be the refuge for all destitute jurisdictions.

It is said that a court of common law would not grant a prohibition; but I have never understood that the grant of a prohibition by the court, having a prohibitory authority, was mere matter of inclination and will, to be granted or withheld at pleasure; or that it was at all necessary, in order to justify the grant of a prohibition, that the court to which the prohibition was issued, was guilty of any direct invasion of a jurisdiction belonging to the court which prohibits. I should presume that whenever a court usurps a jurisdiction that does [ \* 63 ] not belong to it, a prohibition is grantable \* *ex debito justitiæ*, and for the very purpose of correcting such an usurpation, and preserving the subject courts within their proper limits.

It may be said, that as the parties in this case have both consented to the jurisdiction of the admiralty, the case might have proceeded safely to a sentence, without a fear of prohibition, and that no prohibition could be afterwards granted; and this brings me to a second point to be considered — the merits of this case. Now these merits are very considerable in point of magnitude, and very involved in point of transaction; they comprise an interest of several thousand pounds, and they go through a course of transactions extremely complicated in themselves, and turning upon questions not of law, but of mercantile practice, and mercantile prudence, considered upon oriental views and usage, very different from the case I have cited, which lay within the compass of a single 1000*l.*, and involved no question at all that could be agitated upon the facts. I confess it appeared to me, when I first discovered that it was a question of such extent and interest, and turning upon transactions of a nature so unfamiliar to legal consideration, that it was quite unfit that I should engage myself therein, without its being at first ascertained that, in so doing I should be only discharging a duty, and not committing a trespass. I am not insensible to the wishes of the parties, but they

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very well know that the consent of parties cannot create a jurisdiction where it does not exist.

Under the influence of these considerations, I had strongly recommended to the parties a reference to merchants, gentlemen well acquainted not only with the conduct of trade generally, but with \* the particular usage and practice of oriental com- [ \* 64 ] merce; and such gentlemen may easily be found within the compass of the city. This proposal was rejected by one of the parties, upon the ground of the expenses already incurred in litigation; upon which I have only to observe, first, that I expressed my doubts and difficulties, respecting the jurisdiction, the very first time that the bond was subjected to my notice; and secondly, that after the future litigation which is to be incurred, still a reference to merchants must unavoidably be resorted to. A court of common law might have the useful assistance of merchants forming a jury for that very purpose; but this court can have no such assistance, and I must take upon myself to decide upon all the merits, without any assistance but such as the counsel can afford; and after these general merits are settled here, in a way which I cannot contemplate without some apprehension, I must then consign the extent of all particular claims to an examination by merchants. I very much doubt whether, looking at such a course of proceedings, and to the probability of future appeals, I am entitled to consider it either more economical, or more just, than the immediate reference which I had recommended. However, in the situation in which I find myself, I think the fairest method of relieving myself, under those difficulties, will be to dismiss the suit on account of the doubts I entertain respecting jurisdiction. The party affected by that sentence may appeal to the Court of Delegates for a decisive solution of those doubts. If they determine in favor of the jurisdiction, they may either retain the cause with much ampler powers than I possess of reaching its real justice, or may \* remit it to me to pursue it, free from the dangers of commit- [ \* 65 ] ting an usurpation, unless the parties should be convinced, by the intimations I have thrown out, of what, in every just view of the matter, it were advisable to adopt.

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From this sentence an appeal was prosecuted to the Delegates,<sup>1</sup>

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<sup>1</sup> The Judges were, Hullock B., Gaselee J., Littledale J., Arnold, Daubeny, Gostling, Blake, Haggard, and Salusbury, LL.D.

where the cause was argued—for the appellants, by the Solicitor General (*Sir N. C. Tindal*), *Lushington* and *Dodson*, LL.D.—for the respondents, by *Jenner* and *Phillimore*, LL.D. and *James Parke*.

DELEGATES. — December 18, 1827.

*Quære.* Whether a bond professing to be a bottomry bond, but excluding maritime risk, is subject to the admiralty jurisdiction. The court directed a search for precedents. Five precedents of such bonds, but no judicial decisions on the point being found, the court, after directing an argument, decided that the interest reserved was maritime interest, and that therefore, *ex concessis*, the bond excluding sea-risk was void.

*For the Respondents.* The instrument in question is not a bottomry bond; it is an absolute mortgage of the vessel, with an illegal interest. We admit that bottomry bonds are drawn in different forms in different countries; but they must be subject to a contingency. Marine risk is of the nature and essence of these bonds; the principles applicable to them are founded on the civil law; and all authorities, text-writers, and precedents, from which the marine law can be drawn, show that maritime risk is indispensable in bottomry bonds, and that they are classed among contracts in which both principal and interest must be at hazard. Dig. lib. 22, tit. 2; Cod. lib. 4, tit. 33; Bynkershoek *Quæst. Jur. Pri.* lib. 3, c. 16, pp. 506, 509; Pothier *Traité du Contrat d'Assurance*, and *De Prêt à la Grosse Aventure*, vol. 3, c. 1, s. 2, and p. 77, et seq. (Ed. Paris, 1781.) Benicke [ \* 66 ] on \* Insurance, p. 72, et seq.; Abbott on Shipping, p. 487, et seq. (5th ed.); Magens on Insurance, vol. 2, pp. 53, 56, 393; *Glover v. Black*, 3 Burr. 1394; *Menetone v. Gibbons*, 3 T. R. 269; *The Jane*, 1 Dod. 461; *Hero*, 2 Dod. 139; *The Nelson*, Brown, 1 Hagg. R. 177.

As far therefore as any forms and precedents exist, or any intimation can be drawn from the cases at common law and in the Admiralty Court, bottomry bonds are invariably subject to the contingency of marine risk. The only instance of a contrary tendency is in *Ladbroke v. Crickitt*, 2 T. R. 649; but in that case the Court of King's Bench expressly declined to give an opinion upon the subject of the admiralty jurisdiction, there appearing nothing upon the face of the decree repugnant to its authority. Whether the bond-holders are with or without a remedy elsewhere is not for the consideration of this court; because parties may make a contract upon which no remedy could be founded either in a court of law or equity, or in the Court of Admiralty.

*For the Appellants.* The grounds upon which Lord Stowell dis-

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missed this suit were, first, his doubts whether the court had jurisdiction; secondly, his doubts whether he could do substantial justice between the parties in so complicated a case. So that the question of jurisdiction may fairly be considered as open to the fullest and most free consideration of the Court of Appeal.

The appellants contend, first, that taking all the recitals and the whole of the condition of the bond together, there is a sea-risk necessarily to be inferred from the obvious intention of the parties; that intention is to be inferred from the bond. \* Secondly, [ \* 67 ] that even if there is no sea-risk upon the face of the instrument, but that it becomes a simple case of hypothecation of a ship by the master in a foreign port for the necessary purposes of the ship, still the Court of Admiralty has jurisdiction.

The intention of a written contract is to be collected from the whole, and not from insulated parts. In *Thorpe v. Thorpe*, 1 Lord Raym. 235, it was ruled, that the general words in a release should be qualified by the particular words in the recital. A similar rule of construction was laid down in *Butcher v. Butcher*, 1 New Rep. 114. But this rule of construction is too obvious to require any authority. The whole of the condition of this bond must be looked at in order to discover the intention. The intention of the captain to borrow upon bottomry is manifest. He recites expressly his inability to borrow a sufficient sum fully to repair the ship, either on the security of the said ship or otherwise. He then recites that he had taken up a sum which was to run on *respondentia*, on the block and homeward freight of the ship *Atlas*, at the rate of twelve per cent. for the voyage. There is therefore nothing in these recitals but a manifest object to make a bottomry contract. The evidence shows that it was in the contemplation of all parties that the contract should be a regular bottomry bond. The term *respondentia* is used generally and perhaps indiscriminately for money lent, whether on the cargo or on the ship; but the circumstances of this case prove that it was a bottomry transaction. Application had been made to all the principal houses in Calcutta for money on bottomry; and was it to be supposed that Alexander & Co. would advance it on less security? They were not the agents or \* correspondents of the [ \* 68 ] owners of the ship. The ship was consigned to them without their previous knowledge, and no provision had been made for extraordinary advances. Captain Clifton supposes that the agreement, from the commencement, was for the advance of money on bottomry; and the bond is insured. The only difficulty arises upon the words in the instrument, "or in case of the loss of the said ship *Atlas*, then within thirty days after the account of such loss shall have been



received in Calcutta or London." But this clause is so manifestly inconsistent with the preceding conditions, and in contradiction of the declared object of the bond, that the words may be regarded as senseless, as the insertion of an ignorant scribe, and repugnant to the rest of the conditions. The clause ought therefore to be rejected.

HULLOCK, B. Can the court strike out the clause, and amend the bond ?

*Argument resumed.* By the law of England, instruments are to be construed according to their general intent, and bonds of this description are not considered strictly. In *The Nelson*, that has been cited, and in *The Tartar*, 1 Hagg. Ad. R. 13, the bonds were held valid as to that part which was good, the court, in each case, rejecting the clause affecting to bind the owner; and, in point of principle, one clause may be rejected as well as another.

HULLOCK, B. In those instances the bonds were generally good. Here this condition destroys the whole instrument.

*Argument resumed.* In *The Augusta*, 1 Dod. 283, the court held that it was not necessary a bond should be either good or [\* 69] bad *in toto*, a principle \*which has been recognized in subsequent cases. If this ship had been lost, then this condition of the bond would have come in question; but the ship is safe, and it is only the good part of the bond which is before the court. Any construction should be had recourse to rather than that the bond should be held void.

But secondly, if there be no sea-risk, still it is a good bottomry bond. The quotations from the Roman law do not apply, and the passages from Bynkershoek are strictly confined to what is the law of Holland. In Abbott's *Treatise on Shipping*, this subject is touched too slightly to amount to a decisive authority. That learned writer says, (p. 117, 5th ed.) "The repayment of money lent on bottomry does in general depend upon the prosperous conclusion of the voyage;" and Park, in his chapter on Bottomry and Respondentia, citing 2 Blackst. Com. 457, uses the words, "It is understood that if the ship be lost, the lender also loses his whole money." But Pothier writes expressly on this point, and he does not insinuate that a bond excluding sea-risk is void; but he says, "The lender may make a present of the *naviticum fœnus*, and establish the bond." Pothier, (*ut supra*), s. 4, *Du Profit Maritime*, pp. 84, 85.

It is clear that the Admiralty Court has jurisdiction in a case of

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hypothecation abroad. *Sansum v. Braggington*, 1 Ves. 443, and *Belt's Supplement*, decided that a ship pledged abroad by the master for expenses was well hypothecated, and that the part-owners were liable. There the lender had a personal remedy against the owners, the deed of hypothecation being absolute, and binding the owners by its terms. But this does not show any \*ground [\*70] upon which the Court of Admiralty should not have jurisdiction in the present case, where the deed does not profess to bind the owners, but only the bottom of the ship. The courts of common law, having no jurisdiction *in rem*, have been anxious to uphold the authority of the Admiralty Court. They have never adverted to a maritime risk as the ground of the admiralty jurisdiction upon bottomry bonds; and the want of a remedy in those courts entitles this case to a favorable consideration. The reports furnish several cases to prove that a marine risk is not necessary to make an hypothecation. In *Menetone v. Gibbons* there was nothing to show whether the instrument was a bottomry bond, strictly so called. *Ladbroke v. Crickitt* establishes at least that a bond of hypothecation of the same description as the present has been made the ground of a decree in the Admiralty Court. They further cited *Bridgman's case*, Hob. 11; *Moore*, 918; *Scarborough v. Lyrus*, Latch, 252; *Corset v. Huseley*, Comb. 135; *Benzen v. Jeffries*, 1 Lord Raym. 152; *Johnson v. Shippen*, 2 Lord Raym. 982; 1 Salk. 35.

HULLOCK, B. The judgment of the Court of King's Bench in *Ladbroke v. Crickitt* leaves the present case quite free. Indeed, it may be inferred from the bond in that case that there was a sea-risk.

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After the argument, the court having directed a search to be made whether any cases could be found in which the Court of Admiralty had entertained a suit upon a bond, professing to be a bottomry bond, but which excluded maritime risk, \*five bonds [\*71] were on this day produced, namely, *The Fame*, M'Known, dated 1799; *Maria*, Burton, 1800; *Jack*, Pedder, 1807; *Maria Dolores*, Fremel, 1811; *Mayflower*, Alexander, 1815. Of these cases, it was admitted, not one had been brought to the notice of the Court of Admiralty. In the *Mayflower* alone an appearance was given for the owners, and an act on petition entered into and concluded; but the opposition being confined to the charges, and not at all respecting the validity of the bond, the case was ultimately disposed of upon arbitration, and never received a judicial investigation. The counsel for the appellants did not rely upon these five cases as adjudged

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cases, nor as precedents, but in order to show that they had passed in the common routine of business, without an objection being raised to the validity of any one of the bonds, of which the general character and description was hypothecation without sea-risk.

After some observations upon these cases, the court directed the question to be argued, Whether the amount of interest reserved in the bond under consideration was, or was not, more than legal interest.

*For the Appellants.* The obvious intention of the parties was to make a bottomry bond, and that consideration disposes of the question; because, whether the interest reserved was twelve per cent. or any other sum, it was a maritime interest. If the contract is to be impeached as usurious, the burden of proof rests with the other side; but there is nothing to show that it was usurious. By the 13 Geo. III. c. 63, s. 30, interest at twelve per cent. is allowed in the East [ \* 72 ] Indies, the words of \* which statute run with no sensible variation from 12 Anne, stat. 2, c. 16. To construe the interest in this bond usurious, it must be shown that there was a corrupt agreement for more than twelve per cent. It is not sufficient, as in the present case, that by possibility the sum may exceed the rate of legal interest, but it must appear that the bondholders, at the time, actually contemplated extortion. No case has decided that a mere casual and possible excess of legal interest will invalidate a contract. Usury, which is to avoid a deed, cannot be presumed. Here the time of sailing, and the duration of the voyage, were uncertain; the vessel was not bound to leave the port of Calcutta for fifteen months after the execution of the bottomry bond. It was, therefore, anticipated that such a period would elapse before the ship might sail; and the voyage frequently occupies six months. It can be proved by calculation, that, at the time the bond became payable, no interest, beyond the legal rate, was due. Hawkins, c. 82, s. 29, lays it down in broad terms, "that if the interest be only put in hazard, and the principal secured, the whole is usurious;" but the cases cited in the margin do not bear him out. *Long v. Wharton*, 3 Keb. 304, is not an authority on a question of this kind. *Bedingfield v. Ashley*, Cro. Eliz. 741; *Roberts v. Trenayne*, Cro. Jac. 506; *Chesterfield v. Jansen*, 2 Ves. 124; 1 Atk. 301, do not support the case. The *dictum* of Dodderidge, J., in *Roberts v. Trenayne*, is an authority for the position in Hawkins; but that differs from the present case, because here the rate of interest may be short of the legal limit fixed by the statute. There is no authority to show that an uncertain contract is usurious.

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The Industry. 2 Hagg.

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*For the Respondents.* By bare possibility, the \*sum re- [\*73] served might not exceed legal interest; but this could scarcely happen except in the event of the ship not sailing for fifteen months, and of an unusual and improbable length of voyage. The parties contemplated more despatch; and the bond stipulates for the immediate repair of the vessel. The principal advanced is not put in hazard; and the calculation of premium (for interest it is not called) was clearly for the voyage.

The court then stopped the argument, and observed:—there was enough to show that the parties contemplated a maritime interest for the voyage; and that *ex concessis* a maritime risk was then necessary. The bond, therefore, could not be acted upon, and was void.<sup>1</sup>

Sentence affirmed.

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### INDUSTRY, Capiter.

March 14, 1827.

The stat. 1 & 2 Geo. IV. c. 75, s. 9, requiring the parties dissatisfied with an award of magistrates in a salvage case, to declare, "within ten days after such award is made, and not afterwards," their desire of obtaining the judgment of the High Court of Admiralty; the ten days having expired, the award is conclusive. *4l. allowed nomine expensarum. Semble,* that verbal notice to the magistrates' clerk is not sufficient.

THIS was an appeal by the owners from an award of salvage made at Great Grimsby by three magistrates for the county of Lincoln. The salvors appeared under protest; and, referring to the 1 & 2 Geo. IV. c. 75, s. 9, alleged, that the award was made on the 27th of October, 1825, and communicated to the owner's solicitor on the same day, and that no notice of appeal was served until the 7th of November, which was not within ten days, the [\*74] time prescribed by the statute.

The owner of the cargo, Mr. Consitt, a merchant at Hull, stated in his affidavit, "that on the 24th and 27th of October, he had informed the magistrates that if they awarded any salvage he should appeal: that on the afternoon of the 27th, when he left Grimsby, no award had been made; that the first information he received of it was by a letter on the 31st; and that on the 1st of November he

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<sup>1</sup> See *Simonds and Loder v. Hodgson*, 6 Bing. 114.

gave verbal notice to the magistrates' clerk of an appeal, and requested a copy of the proceedings for that purpose; that on the 3d he signed a notice to each of the magistrates to the effect, that he should appeal; that these notices were received on the 6th at Grimsby in order to their being served; but that the 6th being on a Sunday, the service was delayed till the 7th, when it was effected; and that on the 8th a copy of the award was first communicated to the deponent's agent, and by him transmitted to the deponent."

*Jenner*, for the owners. The award of 40*l.* and the expenses is excessive; the whole value of ship, freight, and cargo, not exceeding 120*l.* No valid objection to this appeal can be raised; for, 1st, the award was not signed till the day after that upon which it was dated, and 2dly, though the notices of appeal were not served till the 7th, yet the postponement was unavoidable, as the 6th happened to fall on a Sunday: the service on Monday must therefore be considered as within the time named in the statutes. The property in the present case was small; but to support this protest would establish a dangerous principle, and one that might frequently affect important interests.

[\*75] \**PER CURIAM*. Was the award in the first instance committed to writing? The act, I think, absolutely requires that it should be in writing.

*Jenner*. The inference from sections 9 and 10 undoubtedly is, that the award should be in writing; the ninth section directs, that a copy of the award on unstamped paper should be transmitted to this court. In the present case, however, it was clear, and from the affidavit of the magistrates' own clerk, that the award when made was not put into writing.

*Lushington*, for the salvors. The statute is express and imperative, that the notice of appeal to the magistrates "should be made within ten days, but not afterwards." Admitting therefore that the award was not even made till the 28th of October, still the notices should have been served on the 6th of November. It was true, that the 6th happened to be a Sunday, on which account a process of this nature could not under the 29th Car. II. c. 7, be legally served on that day; but then it was the duty of the appellant to have adverted to that circumstance, and provided against the expiration of the time by an earlier service. The day of the date of the award must be taken as one of the ten days allowed by the statute. This is manifest from

Lord Mansfield's observations in *Rex v. Adderley*.<sup>1</sup> But whether this award were signed on the 27th or 28th, it bore date on the 27th of October: and that was sufficient to sustain the protest, for the words of the statute are "within ten days after the award be made;" and the magistrates' clerk, upon whose affidavit reliance was placed to show that the award \*was not signed till the 28th, [\*76] deposed to its being made on the 27th.

## JUDGMENT.

LORD STOWELL. This is a case which does not call upon me to decide upon the merits of the salvage transaction out of which the present question arises. Whether this protest, founded on a statute trenching undoubtedly on the ancient jurisdiction of this court, must be sustained or overruled is the only point for my consideration. The statute of Geo. IV., in giving an opportunity of appeal, has limited the time to ten days, and that in strong terms, not only affirmatively, but negatively; for the language of the ninth section is, "within ten days after the award is made, but not afterwards;" a form of expression by which the court is necessarily much narrowed in its construction of the act of parliament.

The vessel, it appears, was carried up to Grimsby; and the question of salvage was heard before three magistrates of the county on the 24th of October, when witnesses were examined; the matter was then adjourned to the 27th, when again the same parties attended; and on that occasion they were prepared, I must suppose, or at least ought to have been prepared, to do what was necessary on the award. The award was made on that day, and announced. Mr. Consitt, one of the owners, was dissatisfied, and determined to appeal; but it has happened that the communication of this appeal to the magistrates was not made till the 7th of November, which is beyond the time prescribed. It is then impossible for me to entertain this as a regular appeal; the party should have attended \*to [\*77] the requisites of the statute; and if he were inattentive this court cannot assist him. There is, I understand, the utmost facility of communication between the towns of Hull and Grimsby, by passage-boats twice a day. The magistrates gave 40% in the exercise of their discretion; and the owner by his inattention has debarred himself from the benefit of an appeal which the statute allows under certain regulations; I must then consider the award conclusive, and I certainly shall not introduce myself into this appeal. The only diffi-

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<sup>1</sup> 2 Doug. 464.

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The Mulgrave. 2 Hagg.

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culty is as to the costs incurred by the salvors, who have been unnecessarily brought before this court; and in that matter I shall allow them 4*l*.

Appeal dismissed.

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MULGRAVE, Garbutt.

March 28, 1827.

Where a vessel in distress entered into an agreement with the master of another vessel for assistance for a sum certain, the court cannot entertain a claim from the owner for salvage.<sup>1</sup>

THIS was a cause of salvage, instituted on behalf of Hugh Gill, sole owner of a fishing-smack. The circumstances were as follows:

About 7 o'clock P. M. of the 5th of November, 1826, The Ebenezer, laden with a cargo of haddocks, and navigated by seven persons, whilst passing through the King's Channel off Harwich, on her way to the London market, was hailed by The Mulgrave; and after some negotiation, the master of the smack and three of his mariners agreed, (after having asked 80*l*.) for 60*l*., to render their assistance: they accordingly worked at [ \*78 ] the pumps \*during the night, the smack keeping in company. About ten the next morning, the assistance of six further seamen were obtained from two other vessels; and to these the captain of The Mulgrave gave 35*l*. The ship reached Gravesend about 6 P. M. of the 6th. The value of the ship and cargo was 10,400*l*. By the delay thus occasioned, the owner of the smack suggested a loss on his cargo of 26*l*.; for the recovery of which he entered the present action: 60*l*. had been brought in and tendered, together with such expenses as were due by law, in full for salvage services.

*Lushington*, for the owner. The owner is entitled to a compensation: his vessel was detained, and the crew left it to assist The Mulgrave.

*Addams, contra*. This is not a salvage case. The whole was

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<sup>1</sup> [The True Blue, 2 W. Rob. 176; 7 Notes of Cases, 361; The Henry, 2 Law & Eq. R. 564.]

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The *Harvey*. 2 Hagg.

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matter of agreement. I admit that if a vessel were met in extreme peril, and received assistance, the court would consider the detention and loss. In the case of *The Phoenix*, (Michaelmas term, 1826,) the court held that, generally, owners were not entitled.

#### JUDGMENT.

LORD STOWELL. This vessel, in the course of her navigation, experienced some damage in running upon a wreck: she was in some danger, and there was a necessity for assistance. The men of *The Ebenezer*, the first that applied, entered into a bargain, which may be supposed hard enough — smart enough for the service, since it is well known that there are abundance of smacks in that part of the Channel, so that additional assistance might easily have been obtained. *The Ebenezer* was a fishing smack; and it is quite \* evident, that if a smack of that description, with her cargo [ \* 79 ] on board, were to be detained, it would bring the fish to a bad market. An agreement was made with the vessel in distress, and it was made by a negotiation which received its accomplishment by a performance of service. It is said the owner of the smack must have suffered some injury by the detention of the vessel; and, perhaps, the court would have considered his claim, if the present case had been a case of salvage; but it is one of contract, and I cannot entertain the question: were I, however, owner of a vessel of this magnitude, I should make no hesitation in acceding to the demand. I pronounce against the action, and dismiss the parties who appeared to defend it, but not with costs.

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HARVEY, Peach.

March 28, 1827.

A man being entered in the articles as second mate, but with no rate of wages affixed, the court held, first, that such omission let in parol evidence of an agreement; secondly, that the parol evidence establishing that the man was taken out of friendship to the father on a trial voyage, and with certain indulgences and advantages, amounting to a valuable consideration in lieu of wages, a claim for wages was not sustainable, especially as the master had at all times denied that any wages were due.

WILLIAM THOMAS sued for wages as second mate, (to wit, at the rate of 3*l.* per month,) during a voyage to Van Diemen's Land and New South Wales, and back to Great Britain. In the schedule to



the ship's articles his name was entered in that capacity; but no rate of wages, either by the month or for the voyage, was [ \*80 ] affixed to his name. The period of service was from the \*7th November, 1824, to 30th May, 1826; and the vessel had earned considerable freight both out and home. The demand was opposed on the ground that the claimant had been taken the voyage out of friendship to his father, and upon the distinct understanding that he should receive no wages, but should sleep and mess with the cabin passengers. His incapacity for the office of second mate was also pleaded. These statements were denied; and attempted to be disproved.

*Addams*, for the mariner.

*Dodson*, *contra*.

#### JUDGMENT.

LORD STOWELL. The case,<sup>1</sup> urged as a decisive authority for the present, contains no small resemblance in many circumstances, and even in its foundation; they are both of them cases of young men, not previously much educated to the sea, and both of them intrusted to their respective captains for the purpose of an education in sea service, and for various stations in it; but with all these features of resemblance, they appear to me very distinguishable, on the grounds upon which a decision should be respectively applied to them. One of these grounds certainly is, that in the former case a debt was actually acknowledged, by a tender made to the party, which reduced the whole question to a mere question of *quantum*. The young man in the former case must have been a person of singular talents for the occupation in which he was then engaged; for with very [ \*81 ] little preparation for its duties, he qualified himself in the course of his voyage to execute the duties of important stations, with sufficient ability, both as first and second mate. But upon the demand of wages, the captain, who was likewise owner of the vessel, refused all payment on account of no particular wages being specified in the mariner's contract: afterwards, however, he submitted to a payment, thereby acknowledging a debt, and reducing the whole question to a question of *quantum*. There was another point which entered deeply into the consideration of the court: the captain, notwithstanding the testimonial given by himself of the

<sup>1</sup> The Porcupine, Laing, vol. i. p. 378.

general good behavior of this person, by way of set-off against the demand of wages, charged him with dishonesty and petty thefts, in the proof of which there was an entire failure: and the court was clearly of opinion that full satisfaction was due to him for such an unfounded attack upon his moral character.

This case sets off with the same circumstance, that no wages are specified for this young person in the mariner's contract; but beyond that common circumstance, there are some great diversities between the two cases. Here the father was an old and intimate friend of the captain, a pilot of character, who had lived with him much in the habits of private intimacy, and had often navigated this ship down the Channel: the intimacy so produced led to a request from the father to the captain to take his son (who had performed a trial voyage to China) upon a trial voyage; the proposal was willingly accepted. He was to sail with the nominal character of second mate, and subsequently of boatswain; he was to sleep in the cabin, and to mess in the cabin; \* indulgences of more [ \*82 ] pecuniary value than would have been equal to the regular wages. It appears, likewise, that the captain paid wages to other persons to act as private tutors to him, in the different stations to which he was appointed, but not so well, personally, qualified to discharge. These were all valuable considerations for such services as he could give, besides the opportunity of acquiring maritime science and experience in the course of a long voyage. Upon the return to England, a demand is made for wages, and is refused; that refusal is maintained to the present moment; and it stands, not upon a question of *quantum*, but upon a denial of all obligation of payment, founded upon the original contract, and upon the valuable considerations which under it he had enjoyed. The question then comes to the meaning of this original contract. This contract is left imperfect in the articles, and it is open to both parties to supply the deficiency by parol evidence. The statute 2 Geo. II., c. 36, s. 2, says, that such "agreements and contracts" are "conclusive and binding;" but those terms are not applicable to articles which bind to nothing, and which specify no consideration. It was the intention, undoubtedly, of the Act of Parliament, that written articles should in all cases be framed; and the inconvenience which has taken place in these two cases proves the expediency of such a regulation. But there may be justifying cases, where such an omission may occur. Very young persons, not intending to ship as apprentices, but making trial voyages, and the captains who accept them, may find considerable difficulty in settling before hand a proper *quantum meruit*, and an \* omission will then almost unavoidably occur. In such [ \*83 ] cases reference must be had to parol explanations of the

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The Portsea. 2 Hagg.

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original understanding of the agreement; and, here, I am strongly of opinion that the preferable explanation is to be found on the side of the captain: for, on the other side, no explanation is furnished to the court by any admissible evidence; for the father of this young man, interested as he admits himself in this suit, is, on this account, a disqualified witness; and no other material proof is offered.<sup>1</sup> On the part of the captain there are several witnesses, and among them Mr. Evans, whose testimony alone, if true, is decisive upon the subject: and I do not think it a sufficient objection to his testimony, that his conversations with the captain in respect to this young man are not to be found in the allegation as well as in his evidence—that is a technical objection, not to be too strictly applied. This witness assisted when the articles were signed, and he deposes expressly that when William Thomas' name was called, the captain replied, "No wages:" and that this young man and his father, both of whom were present in the cabin, acquiesced without the slightest objection. The nature of the contract is likewise strongly guaranteed by the transactions that took place, by the indulgences, and by [ \* 84 ] \*considerations which were paid for the assistance this young man received. Upon the whole, regretting that resort has been had rather to an expensive litigation than to ancient habits of kindness, I think myself not authorized to pronounce for this demand.

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PORTSEA, Lamb.

March 14, 1827.

A vessel being sold under a decree of the Court of Admiralty in a suit of subtraction of wages, the court, having no cognizance of mortgagees, will not order the surplus of the proceeds to be paid to a mortgagee to whom possession had never been given, but will direct such surplus to remain in the registry, subject to such order as may come to the court.<sup>2</sup>

THIS vessel had been sold, in August, 1826, under a decree of the High Court of Admiralty, at the instance of several seamen in suits

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<sup>1</sup> At the opening of the cause, an objection was taken to the evidence of Daniel Thomas, (the mariner's father,) and sustained. In answer to the 10th interrogatory, he said,— "He has made an advance of 15*l.* on account of the expense of carrying on the proceedings, and has given bail: he supposes he would be liable for the same, and for the other expenses incurred by his son, in case he should not succeed in his demand."

<sup>2</sup> [But see *Leland v. The Medora*, 2 Wood. & Min. 92.]

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The Portsea. 2 Hag.

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for subtraction of wages. The proceeds amounted to 2,607*l.* 15*s.* 6*d.*; the balance was 1,500*l.* At the time the sale was effected, no appearance was given by the representative of William Shephard, the late owner. On the first session of Hilary term, Thomas Shephard, sole executor of William, prayed that the balance of the ship's proceeds remaining in the registry might be paid to him, when a proctor on behalf of John Middleton alleged that he was the legal holder of a bond of hypothecation for moneys advanced by him on the security of the said ship and freight, that he had entered an action against the proceeds, and now prayed a warrant to arrest the same.

An act, on petition, was entered into, in which it was alleged that William Shephard, whilst living, the sole owner of The Portsea, did, in August, 1824, when the ship was in the port of London, and \* about to proceed on a voyage to the East Indies, bor- [ \* 85 ] row of John Middleton, on the security of the vessel, 3,000*l.*

sterling, for the repayment whereof with interest at 5 per cent. Shephard did, by a certain deed or indenture dated 13th August, 1824, bargain, sell, assign, transfer, and set over to Middleton, his executors, administrators, and assigns, the ship, her tackle, apparel, furniture, and appurtenances, with all policies of insurance effected or to be effected thereon, and all the estate, right, title, interest, property, claim, and demand whatsoever of him, Shephard, of, into, or out of the same, or any part thereof. And all bills of sale, certificates of registry, deeds, and writings whatsoever to the vessel belonging, to have and to hold the same upon trust, and with power to sell the same for the repayment and satisfaction of the principal sum of 3,000*l.* with interest as aforesaid: provided that the 3,000*l.*, with the interest, should be paid before the 13th of August, 1826. That no part of the sum so advanced and secured upon the hull and bottom of the ship had been paid; and that Middleton had no security whatever for the same, or any part thereof, save the ship, or the proceeds thereof.

On the other side it was alleged, that the deed referred to was an indenture of mortgage under seal; and was not in any manner cognizable by the authority of this court. That the deed was made and given as a collateral security only for the money lent and advanced, and the legal remedy can only be against the executor of the mortgagor; that the vessel having been sold under the authority of this court, the balance of the proceeds in the registry forms a part of the \* personal assets of the deceased, which the ex- [ \* 86 ] ecutor is bound to administer according to law; and that if the balance should be paid to Middleton, the remaining creditors would be unjustly deprived.

*Lushington* and *Addams*, for the mortgagee. — No question arises on the validity of the deed; it is not opposed, and it is admitted that the money has not been repaid. It is objected, on the part of the executor, that the court has no jurisdiction; and secondly, that if it has, the proceeds must be decreed to him. The circumstance of the deed being under seal is of no importance, since the court has jurisdiction over the subject-matter; and the mortgagee only is applying for a continuance of the exercise of that jurisdiction; he is not suing originally, as mortgagee, to arrest the vessel. The court enjoys a large jurisdiction over proceeds in its registry: they have been granted out to material men, — *The John, Jackson*,<sup>1</sup> — and an undisputed mortgagee may be considered as analogous in his title to material men. In *The Flora, Findlay*,<sup>2</sup> it was held that the Court of Admiralty was bound to notice debts on record. Here is a similar claim, — the mortgagee is entitled to the money, and has a specific lien on the ship. The money must ultimately come to him, for the demand is not disputed; and the executor cannot have it for a general distribution among the creditors. That the bond was dated prior to the 6 Geo. IV. c. 110, does not, we conceive, alter the case.<sup>3</sup>

[ \* 87 ] \* *Jenner, contra*. The executor is bound to protect the general interests of all creditors. Middleton was never in possession of the vessel; the possession always remained in the owner; and the creditors who furnished the necessaries for fitting out

<sup>1</sup> 3 Rob. 290.

<sup>2</sup> Vol. i. 298.

<sup>3</sup> In section 45, it is enacted, "That when any transfer of any ship or vessel, or of any share or shares thereof, shall be made only as a security for the payment of a debt or debts, either by way of mortgage or assignment, to a trustee or trustees, for the purpose of selling the same for the payment of any debt or debts, then and in every such case the collector and comptroller of the port where the ship or vessel is registered, shall, in the entry in the book of registry, and also in the indorsement on the certificate of registry (in manner hereinbefore directed,) state and express that such transfer was made only as a security for the payment of a debt or debts, or by way of mortgage, or to that effect; and the person or persons to whom such transfer shall be made, or any other person or persons claiming under him or them as a mortgagee or mortgagees, or a trustee or trustees only, shall not by reason thereof be deemed to be the owner or owners of such ship or vessel, share or shares thereof; nor shall the person or persons making such transfer be deemed, by reason thereof, to have ceased to be an owner or owners of such ship or vessel, any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship or vessel, share or shares, so transferred, available by sale or otherwise, for the payment of the debt or debts for securing the payment of which such transfer shall have been made."

See the observations upon this statute in Abbot on Shipping, p. 26. 5th edition.

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the ships, supplied them upon his credit. I agree that if the Court of Admiralty has an original jurisdiction over an instrument, the mere accidental circumstance of a seal will not deprive it;<sup>1</sup> but here is a contract entered into on land between two British owners. Some analogy was attempted between mortgagees and material men.

\* *PER CURIAM*. The cases of material men are very different; the court has always been inclined to consider them as privileged.

*Jenner*. If the mortgagee had obtained possession of the ship, and it had been taken from him by the authority of the court, he might have had a lien and a preference, so as to bring the case within that of *The Flora*. The executor is bound to give preference to a specialty creditor; no inconvenience, therefore, will arise to the mortgagee from payment of these proceeds to the executor.

*PER CURIAM*. I shall direct the money to remain in the registry, subject to such order as may come to the court.<sup>2</sup>

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<sup>1</sup> See the cases in *Abbott on Shipping*, pp. 126 – 7, 483, 5th edition.

<sup>2</sup> In *The Exmouth*, Owen, the ship having been sold in a suit for wages, and the claims of the crew and for pilotage being satisfied, the assignees of the owners applied for the surplus proceeds, namely, 3,500*l.* to be paid out to them.

The *King's Advocate*, for a mortgagee, cited *The Portsea*, and submitted that the money should remain in the registry to await proceedings in Chancery.

*Lushington, contra*.

*PER CURIAM*. Sir Christopher Robinson. The interest of a mortgagee is not a question for the decision of the Admiralty Court.\* I direct the proceeds to be invested in Exchequer bills.

*Note*. On 2d of March, 1830, the money remained so invested.

\* See *Fruit Preserver*, Brown, *infra*.

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The Frances Mary. 2 Hagg.

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[ \* 89 ]

\* FRANCES MARY, Kendal.

March 28, 1827.

In a case of derelict of extraordinary merit where the proceeds were 600*l*. and the number of salvors four hundred, the court inclined to give a larger sum, but finally gave only a moiety (as no precedent of the allowance of a larger proportion could be produced,) and directed the costs to be paid out of the other moiety.

THIS proceeding was at the instance of Lord Napier, the commander, and the rest of the officers and crew of H. M. S. Diamond, against The Frances Mary and her cargo, and also against Robert Mackie the claimant. The act on petition alleged that on the 24th June, 1826, H. M. S. whilst on her voyage from Rio de Janeiro to Lisbon, fell in with a large vessel, water logged, destitute of every species of rigging, her bottom and sides covered with barnacles and weeds, and wholly abandoned. Measures were immediately taken to navigate the derelict to the island of St. Mary's, the nearest port; and on the evening of the 27th June, having put her in charge of Mr. Brown, the second master of The Diamond, three midshipmen, and eight seamen, with a boat and provisions for two months, she parted company from The Diamond. On the 24th of July, the vessel was got close to St. Mary's, when it was necessary to obtain the assistance of a small schooner, four boats, a pilot, and thirty men, in order to tow her into port. The vessel was, after some interruption by the Portuguese authorities, hauled up on the beach; a new rudder was made, and on The Diamond's reaching the island on the 14th of August, the wreck was towed to St. Michael's, where having been fitted with pumps and her jury rudder secured, she was removed to the island of Terceira, for the advantages of its harbor. On the 31st,

The Diamond sailed from Terceira, towing the derelict, and [ \* 90 ] after a succession of variable weather, reached the outer anchorage of Milford Haven on the night of 24th September; and on the evening of the 26th, was secured, with the assistance of a steamboat, off the naval dock-yard at Pembroke.

The proceeds of the ship and cargo were estimated at 600*l*. There were 400 salvors.

The *King's Advocate* and *Jenner* for the salvors.

The facts are not disputed; and the salvors are entitled to more than a moiety.

*Lushington* and *Salisbury*, *contra*. Where the vessel is claimed by a private owner a moiety cannot be exceeded. *L'Esperance*, 1 Dod. 49.

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The Prince of Angustenburg. 2 Hagg.

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The *King's Advocate* denied that there was any such settled rule.<sup>1</sup>

PER CURIAM. The fund is unfortunately small, but it is a case of very extraordinary merit, and the court should be liberal. I incline to decree 350*l.* and if an instance can be produced in which, in a case of this description, the court has exceeded \* a \* [ 91 ] moiety, I will award the sum I have mentioned; but if not, I shall direct a moiety to be paid to the salvors.

*Note.* On the 18th of May a moiety was decreed to the salvors, their expenses being first paid out of the other moiety.

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PRINCE OF AUGUSTENBURG.

May 15, 1827.

The private adventure of a purser in a Danish East Indiaman (the ship being condemned as droits of admiralty at Calcutta) restored.

THIS ship and cargo, the property of the Danish East India Company, were condemned at Calcutta as droits of admiralty; and upon an application to the lords of the treasury on behalf of Peter Leisner,

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<sup>1</sup> RELIANCE, Wiley.

February 5, 1811.

A moiety and costs given in a case of derelict of the value of 5,668*l.* where the salvage had been effected with great exertion and risk.

This timber ship was found near 300 leagues out at sea, on the 26th of June, 1809, by H. M. gun-brig *Virago*; she had been long deserted, having been examined by another ship a month before. The ship was about 600 tons; the gun-brig only 185. With great exertions and risk the crew of the gun-brig patched up the ship and towed her to Plymouth, putting themselves on short allowance. They were occupied thirty-six days. The value of the ship and cargo was estimated at 5,668*l.*, and the salvors asked two thirds.

PER CURIAM. This is a case of great merit of different species, and I am inclined to give as much as is usually given. It is only in very particular cases that the court gives more than a moiety. Here the value is large. I content myself with giving a moiety, and I direct the expenses of the salvors to be taken out of the other moiety.



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The Jane Vilet. 2 Hagg.

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the purser, to be indemnified for the condemnation of his private adventure, the matter was referred to this court.

*Jenner.* The private adventures of the master, and several of the officers of this, and many other Danish vessels, have been restored by the court; but there is no instance of a restitution to pursers on board Danish East Indiamen. They act, however, in a similar capacity to pursers on board the English East India Company's ships; are the third ship's officers; are called "assistants;" have only nominal wages, without any commission on the cargo, but are allowed private adventures free of freight. A purser therefore is materially distinguishable from a supercargo; and being an essential officer on board these Danish ships, is entitled to the privilege conceded to the masters and other officers of Danish vessels. He then moved the [ \* 92 ] court "to decree \* restitution of the private adventure, and to direct the proceeds to be paid to the claimant or his attorney."

The *King's Advocate* observed, that in the American war the claims of supercargoes were in a few instances disallowed. He did not oppose the motion.

Motion granted.

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JANE VILET, Tindell.

June 8, 1827.

Where a bottomry bond is admitted to be drawn in legal form and entitled to payment, the parties are bound by the terms of the agreement; and the court will not refer the matter to the registrar and merchants to make such a deduction on account of the rate of exchange as is made in ordinary cases of mercantile negotiation.

THIS was a cause of bottomry. The bond recited that in August, 1826, the master of The Jane Vilet, obtained from Brown, Hoyles, and Norris, merchants at St. John's, Newfoundland, the sum of 231*l.* 5*s.* 1*d.* sterling, to refit the vessel; which sum was to run as *responsentia* on the block and freight, at a premium of fifteen per cent. for her return voyage to Liverpool; and that the principal and premium, amounting together to 265*l.* 18*s.* 10*d.* sterling, should become due in ten days after the ship's arrival at her moorings at Liverpool; or, in case of her loss, such an average as by custom shall have become due on the salvage.

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The *Jane Vilet*. 2 Hagg.

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*Jenner*, for the bond-holder.

*Lushington*, *contra*.

JUDGMENT.

LORD STOWELL. This is a bottomry bond, admitted to be drawn in a legal form, and as such \* entitled to payment. [ \* 93 ] These bonds have always been regarded as matter of serious obligation, protected by the terms of agreement between the lender and the borrower ; nothing else is looked to but what the lender demands and the borrower agrees to ; nobody has a right to alter that agreement. The demand so agreed to is the true measure of the contract, and cannot be altered or modified by either party. In the present case the bond is fully submitted to, but the party who is to pay claims a reduction, on account of an usual reduction which takes place in payments of an ordinary kind, and he desires a reference to the registrar and merchants.<sup>1</sup> This, however, is not a mercantile case ; it is a question of law (if it be a question,) upon which a court holding plea upon such contracts is entitled to decide ; and such a reduction in my opinion is not at all applicable to a written contract of this high nature. The extent of the necessity is measured in the original contract, and cannot be reduced by rules that apply to cases of ordinary negotiation ; the only effect of it would be that a higher demand would be made in such cases by the lender. I am of opinion therefore that no such right exists, and that it cannot be extended to a contract of so sacred a character ; it would be nugatory if it did. I pronounce for the obligation expressed in the contract, with costs.

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<sup>1</sup> It was stated on affidavit, " that it was the constant custom to reduce the Newfoundland sterling money, when payable in Great Britain, into British sterling money, according to the rate of exchange between the two places."

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The Slave, Grace. 2 Hagg.

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[ \* 94 ]

\* THE SLAVE, GRACE.

The KING, and His Majesty's PROCURATOR-GENERAL, and GEORGE WYKE, *Appellants*; v. JOHN ALLAN, Esq., Claimant, *Respondent*.

*On Appeal from the Vice-Admiralty Court of Antigua.*

November 6, 1827.

A female attendant, by birth and servitude a domestic slave, accompanied her mistress to England, resided there for a year, and then voluntarily returned with her mistress to the place of her birth and servitude; though during the residence in England no dominion, authority, or coercion, can be exercised over such person, yet, on her return to her place of birth and servitude, the right to exercise such dominion revives.

In 1822, Mrs. Allan, of Antigua, came to England, bringing with her a female attendant, by birth and servitude a domestic slave, named Grace. She resided with her mistress in this country until 1823, and accompanied her voluntarily on her return to Antigua. Mr. Wyke, collector of the customs at Antigua and the original prosecutor of the present suit, was a passenger on board the same ship. On their arrival at Port St. John, in the island of Antigua, Grace, with whose character and situation Mr. Wyke was well acquainted, landed with her mistress, without any exception made to her condition, and without any formalities at the custom-house observed or required. She continued with Mrs. Allan, in the capacity of a domestic slave, till August 8th, 1825, when she was seized by the waiter of the customs at Antigua "as forfeited to the king, on suggestion of having been illegally imported in 1823." The information was filed in June, 1826. Mr. Allan then made an affidavit of claim, as sole owner and proprietor of Grace, as his slave; and Mr. Wyke, a single witness, [ \* 95 ] was \* examined on interrogatories. On August 5, 1826, the judge of the Vice-Admiralty Court of Antigua decreed, after argument, "that the woman Grace be restored to the claimant, with costs and damages for her detention."<sup>1</sup>

From this sentence an appeal was prosecuted on the part of the crown, and the principal question made, was — whether, under the

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<sup>1</sup> The damages were, upon the report of the registrar, ultimately fixed at 36*l.* 6*s.* currency, the award being made at the rate of 2*s.* per diem. The appraised value of Grace was 125*l.* currency.

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The Slave, Grace. 2 Hagg.

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circumstances, slavery was so divested by landing in England that it would not revive on a return to the place of birth and servitude?

The *King's Advocate* and *Lushington*, for the appellants.

*Jenner* and *Dodson*, *contra*.

#### JUDGMENT.

LORD STOWELL. This case commences with an information against a woman named Grace, who attended her mistress as a domestic servant to England, and returned with her to Antigua; and consists, in the first place, of various counts charging omissions of regulations imposed upon the importation and exportation of slaves to and from the West India colonies; and, in consequence thereof, condemnation, or forfeiture to his Majesty, is contended for.

I have to discharge a debt of obligation to the counsel who have argued this cause on both sides, and have taken great pains in elucidating questions that arise upon it. I have likewise to discharge a \* duty which I owe to the judge below,<sup>1</sup> who has [ \* 96 ] examined the case with very meritorious diligence and acuteness, and thrown very considerable lights upon the general subject. I could have wished that, in a case so novel in this court, it had been furnished with more both of argument and evidence than I have met with in the process which has been transmitted from the inferior court. What the arguments were on either side of the question in the court below, what opposition was given to the doctrines maintained by the court, and by what evidence that opposition was supported, or by what arguments resisted, these papers do not inform me. In a case so important, and unprecedented in this court, I am left to conjecture what the arguments were from other public papers supplied by the advocate-general who argued the cause in the court below, which papers were transmitted to the Secretary of State for the colonies, and by him or his officers, I presume, submitted to the House of Commons.<sup>2</sup> That is not the way in which the superior court usually collects information of what passes in the inferior courts. But these documents come in a form to which I may, I think, without impropriety advert, as containing the probable grounds

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<sup>1</sup> Dr. Nugent.

<sup>2</sup> These papers were, on May 2, 1826, ordered by the House of Commons to be printed.

of opposition in the cause, and on which the judge decided in a way consistent with his view of the question.

The case begins with an information or charge consisting of five counts; the two first of which may be immediately dismissed [ \* 97 ] being not at all applicable to the real state of the parties and only urged by the advocate-general, as he expresses it, "*ex abundanti cautela*," without any expectation of their influencing the judgment. What sort of abundant caution could arise from the introduction of matter which, I understand to have been admitted by the advocate-general, could not have the slightest influence on the cause, I am not informed, and find some difficulty in discovering it; but from the papers transmitted I collect that this *cautela abundans* is founded upon a supposition of the advocate-general that a slave, who had been in England and returned again to the colonies, upon any pretence whatever, was by such residence only entirely enfranchised and became a free person, and was so to be considered in that colony,—an assertion which brings that great question directly before the court.

Having disposed of the two first counts I proceed to the third and fourth. The third count pleads, that "this woman, Grace, after the 1st of January, 1820, was exported as a slave from the island of Antigua, a colony under the dominion of his Majesty, and carried to Great Britain, a territory to his Majesty belonging, without production of certificate of registration and without such certificate having been indorsed by the collector and annexed to the clearance or permit given for the exportation of the said Grace." The fourth count pleads, that "after the 1st of the said month of January, 1820, Grace was unlawfully brought into and landed in the island of Antigua, a colony to his Majesty belonging, from Great Britain, a territory to his Majesty belonging, as a domestic slave in attendance [ \* 98 ] upon the person of her mistress, \* without any extract and certificate of registration being on board the ship in which the said Grace was imported, and together with her on her arrival produced to the collector of the customs, contrary to the form of the statute;" and it has been contended that under the statute, the 59 Geo III. c. 120, s. 12, it was necessary that this person should have had these credentials, as well on the voyage from the colony to the mother country, as also on the return voyage to Antigua.

It appears to me, on a consideration of the act referred to, that it never was intended to put any restraint on a domestic slave accompanying his master to Great Britain, or on his being taken back from Great Britain to the colonies. The regulations were made as well for

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The Slave, Grace. 2 Hagg.

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the purpose of preventing slaves being transferred from any one of our own colonies to other settlements, as also to prevent the introduction of new slaves into any of our colonies, but they have no reference whatever to the transit of slaves to or from this country and its colonies. Upon reference to the act of parliament, I find these words: "With intent that such slave shall be removed to some other colony." (s. 11.) Nothing whatever is intimated as to Great Britain, nor is there any direction that a certificate of registration or indorsement on the clearance of vessels coming to this country, is necessary; nor are any such credentials demanded, or considered as demandable, of vessels coming to this country by the custom-house here, as far as upon inquiry there I know and believe.

I cannot help observing here a little upon the careless manner in which the custom-house officer at Antigua appears to have discharged his duty, if \*there is any duty of this kind imposed upon him. He had come in the ship all the way from England with the slave and her mistress, and he suffers her to go on shore with her mistress without any papers, if papers were at all demandable; and it is not till after two years, that he finds that he had mistaken his own duty, and omitted to demand what he now contends were the necessary documents. I might observe upon the lapse of time between the commission of the offence and the institution of the suit, but I think it unnecessary under the observations already made.

The fifth count is that which is alone entitled to consideration in this case. It states that "she, being a free subject of his Majesty, was unlawfully imported as a slave from Great Britain into Antigua, and there illegally held and detained in slavery contrary to the form of the statute in such case made and provided." The objection, therefore, which constitutes the foundation of this suit and the ground of unlawful treatment, is, that she was a free subject of his Majesty, and under that character unlawfully imported as a slave, and was so treated. Now this averment must be proved; it must be shown that she was so, for otherwise she has no right to prefer this complaint to the court; and if that assertion fails, there is no ground whatever for the insinuation of her being unlawfully treated; for that assertion of her freedom is the foundation of the wrong of which she complains. If she cannot plead with truth that she was a free subject, there is no ground of complaint in her being treated as a slave. Her rights are not violated, and she has no injured rights to represent. It may be a misfortune that she was a slave; but, being so, she, in the present \*constitution of society, had no right to be treated [\* 100] otherwise.

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The Slave, Grace. 2 Hagg.

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I have looked with the utmost attention to discover, if possible, the foundation of her complaint — that she, being a free person, is treated as a slave. The truth of that complaint depends upon the nature of that freedom, if any, which she enjoyed before the institution of this suit; and I can find nothing that warrants any such assertion of a freedom so conferred. The sole ground upon which it appears to have been asserted, is, that she had been resident in England some time as a servant waiting upon her mistress, but without the enjoyment of any manumission that could alone deliver her from the character of a slave which she carried with her when she left Antigua; for I think it demonstrable that she could derive no character of freedom that could entitle her to maintain a suit like this (founded upon a claim of permanent freedom) merely by having been in England, without manumission; for a manumission is a title against all the world. The mode of treatment applied to such persons is a strong illustration between the effect produced by a residence in England and that conferred by a manumission; for manumissions are not uncommon in England, and always granted where there is an intention of giving the party an absolute title to freedom. This suit, therefore, fails in its foundation. She was not a free person; no injury is done her by her continuance in a state of slavery, and she has no pretensions to any other station than that which was enjoyed by every slave of the family. If she depends upon such a freedom, conveyed by a mere residence in England, she complains of a violation of [ \* 101 ] right which she possessed no longer \* than whilst she resided in England, but which had totally expired when that residence ceased and she was imported into Antigua; and that is the proposition which I propose to make good in the course of the following observations.

What is the manner in which a freeman, robbed of his freedom and charged with being a slave, resents the injury done by such wrongdoer? His remedy is immediate and in his own power; for it cannot be maintained that, because the act of parliament for the abolition of the African slave-trade describes this prohibition as extending to slaves, "or persons intended to be sold, transferred, used, or dealt with as slaves,"<sup>1</sup> that it is therefore intended to include persons who are free subjects of his Majesty. What has a free person, relying upon an antecedent freedom, to show, but the freedom of which he is so in possession, in order to assert his own right already acquired and to maintain his freedom with all its present consequences? Could it possibly occur to any person in such a situation to submit

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<sup>1</sup> 47 Geo. III. c. 36, s. 1.

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to the degrading remedy which is here sought for — that is, not to assert his right to a freedom of which he is already in possession? It would, in fact, amount to a disclaimer of any preëxisting freedom. It is a process very fit for the emancipation of a slave, but surely could never be recommended to a person already in possession of a state of liberty freely and fairly acquired.

There is no statute whatever that imposes upon a free person the vindication of his freedom by submitting to a procedure so humiliating to a freeman \* as to sue for it, at the mercy of [ \* 102 ] the crown, under a process which places him at the disposal of the officer of the crown, and subject to all such situations as the slave-abolition laws would warrant. Now, that any free subject of the king could be imported as a slave into any of our colonies, and there detained as a slave, appears to be a contradiction in terms. The former charges all describe this person as loaded with the duty of conforming to the obligations of a slave; whereas, this describes her as a person sailing from Great Britain as a free subject, and therefore not at all bound to those several obligations which lie only upon slaves. The person who sues for his freedom in the manner proposed must submit himself to be apprenticed, or to be enlisted, or placed in some other situation, at the discretion of the officer of the crown. Is that a manner in which a free person ought to assert his right? What has he to do but to bring his action against the defamer of his rights? — and who can doubt but that he would recover most overwhelming damages against the person who had assaulted his freedom, and compelled him to submit to a process that is only applicable to a slave, and to pour upon his gross wrongdoer the whole vengeance of the law? In short, the whole of this procedure is inapplicable to a freeman. It may seem more likely to initiate him into a state of slavery, but it is utterly inconsistent with a spirit of freedom — that spirit which would enable its possessor to resent the outrage with which he was threatened, and, without those degradations, to restore him to himself unaided by such a proceeding as could only be instituted against a person already in a state of slavery. See how a claim of this kind betrays its imbecility. The party \* is seized in the first instance by a custom-house officer, is [ \* 103 ] afterwards handed over to an officer of the crown, under whose direction he undergoes all the process that would be applied to a slave. The treatment differs in no respect; he is not at his own volition, but at that of his guardian. He is then bound to some trade, or enlisted in the army; — nothing of free will of his own, or free action of his own — all at the will of another, — showing most completely a process totally different from that which a real free man



would, of his own accord, establish by his own exertions, in spite of all the opposition that could be employed against it; whilst the other is only a transit from one species of slavery into another.

I come now to the discussion of that point which has been already described as the main point upon which this cause must ultimately depend, and that is, whether this person was, at the time she is pleaded to be a free subject of his Majesty, truly and accurately described as a free subject, and in that character entitling this suit to be maintained; and it does not appear to me at all necessary to apologize for entering into such an inquiry, for it is, in truth, the very point upon which the whole essence of the cause depends, and, consequently, the power of supporting it.

I observe that, by the papers transmitted by the advocate-general to his Majesty's secretary of state, this notion of a right to freedom by virtue of a residence in England is universally held out as a matter which is not to be denied; but it is contested by the judge upon the ground that the residence in England conveys only the character so designated during the time of that residence, and [ \* 104 ] \* continues no longer than the period of such residence.

The person who is a freeman in England returns to slavery in Antigua; that is the whole question in the cause; if to be decided in favor of this female, she has a right to maintain this cause and to claim a judgment; but if, on the contrary, her freedom ceased with her residence in England, she has no right to claim it, and, consequently, no power of maintaining the present suit. The judge of the court below was perfectly correct in entering into this general question, and required no apology for so doing, for it is really the hinge upon which the whole of this case depends.

The question has been argued as depending upon the interpretation of the well known case of *Sommersett*,<sup>1</sup> in which a *habeas corpus* was granted, directed to Captain Knowles, to bring up the body of *Sommersett*, a negro, which was in his possession, in irons, with the cause of his detention. The affidavits stated that *Sommersett* had been bought in Virginia and brought to England by Mr. Stewart, his master, and, on his refusing to return, was sent by his master on board Knowles's ship, to be carried to Jamaica and sold as a slave. It appears that, some time before, this case was argued upon a question addressed to Lord Talbot and to Mr. Yorke, whilst attorney and solicitor-general. They gave it as their opinion, that a slave coming from the West Indies, either with or without his master, to Great

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<sup>1</sup> Howell's State Trials, vol. xx. p. 1.

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Britain, doth not become free, and that his master's property or right in him is not thereby \*determined or varied; and [ \* 105 ] they were also of opinion that the master might legally compel him to return to the plantations; and, as Lord Mansfield expresses it, "they both pledged themselves to the merchants in London to save them harmless from all inconvenience on such a subject," which pledge was afterwards very fully confirmed by a similar judgment pronounced in 1749 by Sir Philip Yorke, then become Lord Chancellor Hardwicke, sitting in the Court of Chancery,<sup>1</sup> both of these persons being great men of that age, and, as Lord Mansfield admits, great men in any age. This judgment, so pronounced in full confidence, and without a doubt upon a practice which had endured universally in the colonies, and (as appears by those opinions) in Great Britain, was, in no more than twenty-two years afterwards, reversed by Lord Mansfield. The personal traffic in slaves resident in England had been as public and as authorized in London as in any of our West India Islands. They were sold on the Exchange and other places of public resort, by parties themselves resident in London, and with as little reserve as they would have been in any of our West India possessions. Such a state of things continued, without impeachment, from a very early period up to nearly the end of the last century.

It appears that Lord Mansfield was extremely desirous of avoiding the necessity of determining the question: he struggled hard to induce the parties to a compromise, and said, he had known five cases so terminated out of six; but the parties were firm to their purpose in obtaining a judgment, \*and Lord Mansfield was [ \* 106 ] at last compelled, after a delay of three terms, to pronounce a sentence, which, followed by a silent concurrence of the other judges, discharged this negro; thereby establishing that the owners of slaves had no authority or control over them in England, nor any power of sending them back to the colonies. Thus fell, after only two-and-twenty years, in which decisions of great authority had been delivered by lawyers of the greatest ability in this country, a system, confirmed by a practice which had obtained without exception ever since the institution of slavery in the colonies, and had likewise been supported by the general practice of this nation and by the public establishment of its government, and it fell without any apparent opposition on the part of the public. The suddenness of this conversion almost puts one in mind of what is mentioned by an emi-

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<sup>1</sup> State Trials, vol. xx. pp. 4, 81.

nent author, on a very different occasion, in the Roman History, "*Ad primum nuntium cladis Pompeianæ populus Romanus repente factus est alius*:" the people of Rome suddenly became quite another people.

The real and sole question which the case of Sommersett brought before Lord Mansfield, as expressed in the return to the *mandamus*, was, whether a slave could be taken from this country in irons, and carried back to the West Indies, to be restored to the dominion of his master? And all the answer, perhaps, which that question required, was, that the party who was a slave could not be sent out of England in such a manner and for such a purpose; stating the reasons of that illegality. It is certainly true that Lord Mans-

[ \* 107 ] field in his final judgment amplifies the subject largely. \* He extends his observations to the foundation of the whole system of the slavery code; for in one passage he says, that "slavery is so odious that it cannot be established without positive law." Far from me be the presumption of questioning any *obiter dictum* that fell from that great man upon that occasion; but I trust that I do not depart from the modesty that belongs to my situation, and I hope to my character, when I observe, that ancient custom is generally recognized as a just foundation of all law; that villenage of both kinds, which is said by some to be the prototype of slavery, had no other origin than ancient custom; that a great part of the common law itself in all its relations has little other foundation than the same custom; and that the practice of slavery, as it exists in Antigua and several other of our colonies, though regulated by law, has been in many instances founded upon a similar authority. Much occurs in the discussion of the advocates on that question respecting villenage, but little appears in the decision of Lord Mansfield upon that point.

It is not necessary for me to relate the systems which had given way of villenage, pure or privileged, to which this species of slavery was compared, though dissimilar enough in very many respects, as is admitted by most writers on the subject, and amongst other persons by the Advocate-General of Antigua, who, adverting to the general system of villenage, ventures very truly to say, "to which colonial slavery may be supposed to bear some analogy, in the absence of more conclusive authority." These systems of villenage had been long, though silently, extinguished, as far back as the reign [ \* 108 ] of Edward VI. at the time when \* Sir Thomas Smith wrote, and who says there were then no villeins in gross remaining in England.<sup>1</sup> Villeins regardant survived them some time

<sup>1</sup> Commonwealth of England, book ii. c. 10.

longer, but these were particular villeins not attached to the persons, but to the manor or soil; not, like negro slaves, to be shifted about for the convenience of the proprietor, without being attached to any particular manor. I cannot help entertaining some doubt whether the resemblance between villenage and the African slavery was so close as to effect by its decay the fall of African slavery in England. Villenage certainly had not prevented the introduction of slavery into this country, and its open continuance here for many years. It does not appear that the public were startled at the revival of villenage under the new form of African slavery. The villeins in gross and regardant were both of a very different kind from that of African slavery. Villeins in gross were liable to any commands of their masters. Villeins regardant were attached to particular manors, and to particular services dependent on those manors. They were men of the form, color, and speech of their masters; born and bred in this country, and not transferable by sale, unless with the lands to which they were attached. The African slavery was very differently constituted: persons of a different birth, complexion, and language, and of all the various ranks of which their own country, Africa, was composed, and employed in various offices according to the convenience of their owners, and transferable by sale at their pleasure,—unlike the cottagers or handicraftsmen of our own country.

\* It may, perhaps, be doubted whether the emancipation [ \* 109 ] of slaves in England, pronounced at the end of the last century, was not rather more owing to the increased refinement of the sentiments and manners of the age than to the decay of the two systems of villenage, one of which had expired two hundred years before, and the other one hundred and fifty years at least, and which then only slumbered in the memory of a few antiquaries. The opinion of Lord Mansfield upon this immediate subject makes a very small part of his celebrated speech; it is almost confined to a particular portion of it. There is hardly any thing else that is expressed, save several well-merited civilities to the gentlemen of his bar, and some expressions of contempt for the danger and jealousy that might be encountered, but of which none ever appear to have occasioned any reasonable alarm. Thus fell a system which had existed in this country without doubt, and which had been occasionally forced upon its colonies, and has continued to this day—that is, above fifty years—without further interruption.

The arguments of counsel, in that decisive case of *Sommersett*, do not go further than to the extinction of slavery in England as unsuitable to the genius of the country and to the modes of enforcement: they look no further than to the peculiar nature, as it were, of our own

soil; the air of our island is too pure for slavery to breathe in. How far this air was useful for the common purposes of respiration, during the many centuries in which the two systems of villenage maintained their sway in this country, history has not recorded. The [ \* 110 ] arguments of counsel do not go \* further than to establish that the methods of force and violence which are necessary to maintain slavery are not practicable upon this spot; and Mr. Hargrave, one of the counsel, who distinguished himself very much in that character by very laborious exertions, almost in direct terms asserts that they cannot go beyond it; for in answer to a proposition which had been made to him, that a modified slavery should be permitted in England which would be followed in the colonies, he expressly says (taking it for granted that the modified slavery in England would not at all affect the condition of slavery in the colonies,) that upon the removal to the place, slavery would again attach upon him with all its original severity. It could hardly be otherwise, than that that gentleman was looking towards the necessary continuance of slavery in its severest form, produced by the return of the slave into the colonies. This I take to be the sense of the passage referred to, though expressed in rather an obscure and involved manner.

It is very observable that Lord Mansfield, when he struggles hard to decline the office of determining the question, confines that question almost in terms to this country; he limits it expressly to this country, for he says, "the now question is, Whether any dominion, authority, or coercion, can be exercised on a slave in this country according to the American laws, meaning thereby the laws of the West Indies? The service performed by the slaves without wages is a clear indication that they did not consider themselves free by coming here." In the final judgment he delivers himself thus: "The state of slavery is so odious that nothing can be suffered to support it but positive law:" [ \* 111 ] \* that is, the slavery as it existed in the West Indies; for it is to that he looks, considering that many of the adjuncts that belonged to it were not admissible under the law of England.

Lord Mansfield very justly observes, that "if the merchants consider the prohibition of slavery in this country of sufficient commercial concern, an application to parliament is the best, and, perhaps, the only method of settling the point for the future." In conformity with this advice, it is much to be lamented that application was not made to Parliament to settle the question upon a right footing, if it were still to be considered as a dependent question. It might have saved a world of trouble and suffering to both parties, which is now to be produced by the springing up of this question at a very late hour

of the day. Persons, though possessed of independence and affluence acquired in the mother-country, have, upon a return to the colony, been held and treated as slaves; and the unfortunate descendants of these persons, if born within the colony, have come slaves into the world, and in some instances have suffered all the consequences of real slavery; and the proprietors of these slaves are now called upon to give up to the public all the slaves that they have thus acquired; and this not only in Antigua, but most probably in all the islands of the Archipelago; for it cannot be supposed that this claim, if maintained with respect to this island, will not be extended to all the others. These are matters that might have cost at that time of day comparatively little expense and little suffering; but which now cannot be settled without a gross violation of important interests on the one side or the other.

\* It appears to me to be a strong presumption in favor of the [ \* 112 ] parties charged with violating the law, that neither the persons so charged, nor those who had an interest in preventing it have, within the space of fifty years that have elapsed, even in one instance, called the attention of English justice towards it. Black seamen have navigated West India ships to this island, but we have not heard of other Sommersetts, nor has the public been much gratified with complaints of their desertion, though it is probable that some may have taken, and not unfairly, the advantage that was held out by the law. I do not think that the fact remaining dormant so long could have happened without some marked difference of its origin and history from that of the ordinary slave-trade.

The system of slavery in our West India colonies was perfect in every part, if I may use that expression, meaning thereby that perfection which consists in the adequacy of the means to produce the intended effect. It was a system not to be thrown out of use, because it was incapable of being used in the full extent in England. With the laws of the colonies it could be conciliated. That system was completely armed at every point; and though frequently softened, as in the case of domestic slaves, it was in no wise deficient in compelling the obedience of its subjects: whereas in England, it was totally impotent, and the law could not borrow those instruments from a foreign law, which were necessary to make the system work properly. This may have occasioned one great difference between the two systems. The fact certainly is, that it never has happened that the slavery of an African, returned from England, has  
 \* been interrupted in the colonies in consequence of this sort [ \* 113 ] of limited liberation conferred upon him in England. There has been no act nor ceremony of manumission, nor any act whatever

that could even formally destroy those various powers of property which the owner possessed over his slave by the most solemn assurances of law, such as pledging him, or selling him for the payment of the owner's debts, or making any other use of him that the law warranted. Such rights could not be extinguished by mere silence, or by this country's declining to act in such a conveyance. There is nothing that marks a liberation from slavery; he goes back to a place where slavery awaits him, and where experience has taught him that slavery is not to be avoided. Slaves have come into this island, and passed out of it in returning to the colonies in the same character of slaves, whatever might be the intermediate character which they possessed in England, and this without any interruption, or without any doubt belonging to their character in that servile state; they go back with a perfect knowledge of the state which they are to reënter.

The entire change of the legal character of individuals, produced by the change of local situation, is far from being a novelty in the law. A residence in a new country often introduces a change of legal condition, which imposes rights and obligations totally inconsistent with the former rights and obligations of the same persons. Persons, bound by particular contracts which restrain their liberty, debtors, apprentices, and others, lose their character and condition for the time when they reside in another country, and are entitled as persons totally free, though they return to their original servitude and obligations upon coming back to the country they had quitted; and even in the case of slavery, slaves themselves possess rights and privileges in one character which they are not entitled to in another. The domestic slave may, in that character, by law accompany his master or mistress to any part of the world, but that privilege exists no longer than his character of domestic slave attaches to him; for should the owner deprive him of the character of being a domestic slave by employing him as a field slave, he would be deprived of the right of accompanying his master out of the colony. On the present question, however, I cannot but think that if the sovereign state has looked upon the manner in which the law has been understood and exercised in a subject-country, without interposing in any manner to prevent it, it has been in fact more criminal, if the case is to be so considered, than the subject-country which has followed the unprohibited practice. And what excuse is to be offered for Lord Mansfield, who long survived the change of law he had made, and yet never interposed in the slightest manner to correct the total misapprehension, if it is so to be considered, of the law which he himself had introduced?

It has been said that, in the decline of the ancient villenage, it be-

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came a maxim of very popular and legal use, "Once free for an hour, free for ever!"<sup>1</sup> and this has been applied as a maxim that \* ought to govern in the case of negro slavery. Now, if this [\* 115] negro slavery was an exact transcript of the ancient villenage, it might not be improperly so contended; but it is to be observed, that this was a maxim introduced when the system of villenage itself was in a state bordering upon decay and growing into general abhorrence and contempt, and that it soon afterwards expired. It is to be noticed likewise, that this system of villenage was confined to this kingdom, though other countries had customs and usages of a similar nature. It was no part of a system extending into foreign countries, or transmarine possessions. Villenage did not travel out of the country, it did not affect the stability of any law, which this country could consider as peculiar to its foreign possessions, and it has never been once applied, since the case of *Sommersett*, to overrule the authority of the transmarine law. This cry of "Once free for an hour, free for ever!" it is to be observed, is mentioned as a peculiar cry of Englishmen as against those two species of slavery. It could interest none but the people of this country; and of these only the masters, for no one else had any interest in the duty or services of their villeins. This cry has not, as far as we know, attended the state of slavery in any other country, though that has been a state so prevalent in every other part of the world, and has existed at all times.

The public inconvenience that might follow from an established opinion that negroes became totally free in consequence of a voyage to England, without any express act that declared them to be so, is not altogether to be overlooked. It is by no means improbable that, with such a temptation \* presented to them, many [\* 116] slaves might be induced to try the success of various combinations to procure a conveyance to England for such purpose; and, by returning to the colony in their newly-acquired state of freedom, if permitted, might establish a numerous population of free persons, not only extremely burdensome to the colony, but from their sudden transition from slavery to freedom, highly dangerous to its peace and security.

It may now be of use to consider what has been the effect of other cases, very few of which occur, of any great affinity with the case of

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1 "Herein," says Lord Coke, "the common law differeth from the civil law; for *Libertinum ingratum leges civiles in pristinam redigunt servitutem, sed leges Angliæ semel manumissum semper liberum judicant, gratum et ingratum.*" 1 Inst. lib. ii. § 204.



Sommersett. There is a case which happened in the Court of Chancery in 1762, under Lord Chancellor Northington (which was before the determination of Lord Mansfield,) I mean the case of *Shanley v. Harvey*.<sup>1</sup> A bill was filed by Edward Shanley, as administrator of Margaret Hamilton, deceased, against Joseph Harvey, a negro, and two persons of the names of Gossrap and Thorpe, his trustees, for an account of part of the personal estate of the deceased. It happened that Shanley had, twelve years before, brought over this slave to this country, he being then only eight or nine years old, and presented him to his niece, Margaret Hamilton, who had him baptized, and changed his name; and on the 9th July, 1752, she, being very ill, about an hour before her death, directed Harvey to take out a purse which was in her dressing-case-drawer, and delivered it to him: saying, "Here, take this; there is 700*l.* or 800*l.* for you, in [\* 117] bank-notes, and some more in money, but I cannot \*directly tell what; but it is all for you, to make you happy. Make haste, put it in your pocket." He then knelt down and thanked her. She said, "God bless you, make a good use of it." The Lord Chancellor Northington, in dismissing the bill, with costs, said that, "as soon as a man sets foot on English ground he is free."

It must be observed, that this is the first time, probably, that this doctrine was so broadly stated in an English court, and, perhaps, a little prematurely; but, it must likewise be observed, that his lordship here mentions only two effects of it; for he adds, "A negro may maintain an action against his master for ill usage, and may have a *habeas corpus* if restrained of his liberty." This is an instance in which the law of England differed most essentially from the law of the slave code in the West India colonies; for there, every acquisition by the slave, whether by legacy or otherwise, went to the master; but not so here, where the law of England adjudged it to the slave. And the Lord Chancellor enumerates another difference; which is, that the law of England empowered the slave to bring an action against his master for ill treatment. Both of these are direct contradictions to the rules of the slave code; but nobody could infer from thence that the whole of the slave code was, by that decision, intended to be vacated in the colonies on that account. The error of the opinion seems to be, that, because the slave code was overruled in England, where the law of England differed from it, it was therefore abrogated in the colonies *in toto*. The slave continues a slave, though the law of England relieves him in those respects from the rigors of

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<sup>1</sup> 2 Eden, 126.

that code while he is in \* England; and that is all that [\* 118] it does. With respect to other severities which it refuses to inflict, it is *spinis de pluribus una*, which does not at all dislodge the other severities of that code, all of which he may avoid by continuing in this country. And it is a most remarkable circumstance, that though this case had been pressed upon the attention of Lord Mansfield in one of the speeches addressed to him, he himself never took any notice of it, although evidently, at that time, anxious to support his new doctrine, and struggling hard to call in aid every authority that could establish it.

Scotland and Ireland have the same privilege as England, being members of the same confederation; and the Scotch judges have well expressed their opinions of the extent of the judgment of Lord Mansfield in the case of *Knight v. Wedderburn*<sup>1</sup> in 1778, a case argued with great ability; in which they determined the extent of this judgment to be, that the dominion assumed over the negro, by the law of Jamaica, could not be supported in this country. What does this prove, but the well-known fact, that different countries have different laws upon the same subject; and even different provinces of the same kingdom? It is a large chapter, and full of many difficult questions, that treats of such diversities, in the writings of civilians. All that the judges, in the different cases I have adverted to, have determined, is, that slaves coming into England are free there, and that they cannot be sent out of the country by any process to be there executed.

\* I come now to consider the adjudged cases which have [\* 119] been adverted to, and there are very few which at all touch upon this point; and I cannot but think that the cases would have been much more numerous and more applicable, if the opinion had prevailed that the case of *Sommersett* had warranted a conclusion of the wide import that is contended for. The first case is that of *Keane v. Boycott*,<sup>2</sup> in the Court of King's Bench. In that case it appeared that a negro, whilst an infant, and in a state of slavery in the island of St. Vincent, executed a contract, by which he bound himself to his then master who was coming to England, to act as his servant for five years; and the action was brought for enticing the boy from the service of his master into the military service, which the boy accepted. An action was brought by the master against the officer who had enticed him; and it was determined that it was a

<sup>1</sup> This case is cited from the "Dictionary of Decisions," vol. xxxiii. p. 545, *et seq.* in a note to *Sommersett's* case, p. 1.

<sup>2</sup> 2 H. Bl. 511.

good contract, voidable only at the instance of the boy, but not void, and therefore could not act as a defence to the action against the officer. But this has nothing to do with slavery, from which, of course, the boy was free from his arrival in England. It turns entirely upon the contract, and, therefore, in no manner touches the question.

The next case, in point of date, is the case of *Williams v. Brown*.<sup>1</sup> That was the case of a runaway negro slave who had come to England, and entered into a contract with the master of a vessel to serve as a seaman during a voyage to and from the West Indies.

[ \* 120 ] The ship was bound to Grenada, \* the very island from which the man had deserted, and where on the arrival of the vessel he was discovered by his master, who claimed him as his slave, and who subsequently agreed with the captain of the vessel to sell his manumission for a price which the master of the vessel paid; whereupon the manumitted slave entered into a contract with such master to serve for three years. Upon his return to England, he sued the master of the vessel for his wages for the voyage, and had a verdict; but a rule *nisi* was obtained, and afterwards argued in the Court of Common Pleas. Mr. Sergt. Shepherd, who was counsel for the man, and was well known as a person who would never omit any plea that could be useful to his client, never urged the point, that, because the man had been in England, and was free there, he was consequently free at Grenada; and Mr. Justice Heath observed, that when the man "was claimed at Grenada, he was incapable of performing the service for which he now brings his action. He was liable," he says, "to severe punishment for having run away from his master; he was a slave for life." Mr. Justice Rooke said, "that though the man might enter into a contract to go to any other place but to Grenada, yet he could not engage to go there without danger of being detained;" and further, that, "being a runaway slave he became liable to punishment, and the forfeiture to his master in Grenada of all the wages which he had earned during the outward voyage; and that, being a slave in Grenada, he could not enter into any contract there without leave of his master." Mr. Justice Cham-

bre observed, that, "being claimed as a runaway slave, he [ \* 121 ] was considered as a criminal; \* he was liable to a very severe punishment; he was incapable of recovering, for his own benefit, the money which he had earned upon the outward-bound voyage." He adds, "that from the contract he could receive no

<sup>1</sup> 3 Bos. & Pull. 69.

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benefit, for his master was entitled to all the wages he might earn." Lord Alvanley, who disagreed with the other judges as to the effect of the contract merely, but not upon the general question, stated, "The plaintiff, being as free as any of us while in England, engaged to serve the defendant who undertook to pay him a stipulated sum;" and adverting to the agreement entered into at Grenada, whereby he obtained his manumission, his lordship further stated, "that the man was thereby redeemed from slavery and the penal consequences attending his then situation;" and he proceeds thus:—"When the plaintiff was claimed in Grenada as a runaway slave, he was not only liable to be remanded into slavery, but by the laws of the island he was amenable to severe punishment."

The man, then, was clearly entitled to his freedom when he first engaged into the service of the ship in London, although a runaway; at least, if there be any truth in these expressions, "that as soon as a man sets his foot in England—if he breathes the air of England—he is free without any further ceremony;" and it cannot be denied to him, although a runaway, as observed by Lord Alvanley, that this runaway was as free as any of us in England. But it appears that this runaway negro was, to preserve his freedom in Grenada, under the necessity of obtaining a manumission there; and he subsequently enjoyed his freedom in consequence of that ceremony; or, as that \*manumission implies, he must have remained a slave [ \* 122 ] in Grenada without it. It is a clear recognition of the necessity of a manumission in that country, notwithstanding he had been in England, and the judges were all concordant in that particular; though Lord Alvanley expressed some doubts as to the validity of the contract upon other grounds. I think that this case bears directly upon the point, and is a direct recognition of the principle contended for, that a slave who returns to his country returns to a state of slavery. It is not to be said that the man's desertion is alleged as the cause of his return to slavery; he had become a free man by landing in England, in the opinion of all the judges, and it is only by virtue of his preëxisting state of slavery, that he became subject to be returned into it again, until his manumission. The four judges all concur in this—that he was a slave in Grenada, though a freeman in England; and he would have continued a freeman in all other parts of the world excepting Grenada.

I have been the more particular in stating this case, because I do think it approaches so near as to possess the authority of a direct decision upon the immediate subject, although I have heard the case sometimes quoted as almost amounting to a direct recognition of the freedom of the slave, on account of his having been in England;

when nothing can be more clear than that it is, in every respect, a direct decision of the four judges to the contrary.

The case of "*Forbes v. Cochrane and Cockburn*,"<sup>1</sup> seems [ \* 123 ] to me to tend, though perhaps not \* so directly, towards the same conclusion. This case happened in consequence of the flight of a number of slaves belonging to Mr. Forbes, a subject of East Florida, on board one of his Majesty's ships of war, commanded by Sir George Cockburn, acting under the command of Admiral Cochrane. These slaves were reclaimed by Mr. Forbes, who insisted upon Sir George Cockburn's sending them back. Sir George Cockburn declined this: saying, "that they had taken refuge on board of an English man-of-war, and that they were free from any constraint of his, although he had no objection if Mr. Forbes could prevail upon them to return; but having received them into his ship he could not direct them to be turned out;" and that defence was sustained by the Court of King's Bench. In truth, this is no more than a decision of that court respecting the privilege claimed by ships of war of sharing in the rights and immunities of their own country. It was likewise decided, that if any attempt had been made, by force, to take the men out of that station and any mischief had happened thereon, the parties guilty of making that attempt would have been liable to a prosecution under the law of England.

Reference has been made to a local act passed by the people of Antigua themselves in the year 1816,<sup>2</sup> to the effect that "if any person claiming to be free, should be committed as a runaway, or [ \* 124 ] supposed runaway slave, and it shall appear to the \* justices that he or she is legally free, or in equity or conscience ought to be considered as free, or hath been generally deemed or considered for any length of time a free person, the justices shall by their warrant direct such person to be immediately discharged out of custody."

The first of these, that of being "legally free," is clearly inapplicable to this case, upon the grounds which I have stated on the general question; and I think the second, that of being "in equity or conscience"<sup>3</sup> considered free, cannot be applicable to slaves coming from

<sup>1</sup> 2 B. & C. 448.

<sup>2</sup> Intituled "An act for altering and amending an act for the better government of slaves and free negroes, dated the 28th of June, 1702." See *Laws of Antigua*, vol. iii. No. 664, s. 3, 4to. edit. Lond.

<sup>3</sup> On questions of "Law and Conscience" respecting villeins, see *Doctor and Student*, Dial. ii. c. 18, 19.

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The Slave, Grace. 2 Hagg.

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England, to whose condition such privilege has been universally denied upon this plain ground, that a residence in England as a free-man had never been held to answer this description. It is what at all times, and at the present time, has been powerfully resisted. The temporary freedom thus acquired has ever been superseded upon the return of the slave; and slaves never have been deemed and considered as free persons on their return to Antigua, or the other colonies.

Those who contend for this interpretation of the law, as giving freedom to slaves merely because they have been in England, are bound to show, that ever since the local act persons returning from England have been allowed freedom upon their return, where not objected to on the part of the slaves themselves. It never could have been intended by this law to have given freedom to persons claiming it in consequence of their coming from England; for that, as I have observed, has been uniformly resisted by the people of Antigua. And \*it is a known and universal rule in the interpre- [\* 125] tation of laws, that that sense is to be put on those laws which is the sense affixed to them by the legislature. They cannot, therefore, be considered as having ever answered the description contained in this legislative enactment; and I understand that it is the constant practice of persons, who intend giving freedom to slaves on their return to the colonies, to execute instruments of manumission previous to their quitting this country for the colonies.

A similar objection lies against the third. It is obvious that this cannot apply to slaves who have returned from England, but to those who might for a time have acquired a nominal freedom by rambling in the colonies under a character of freedom, real or pretended, and if shown to be clearly founded in error, it could not lead to a consequence of freedom. If persons have been rambling about the country under a false character, and that pretension is disproved, they can no longer obtain the benefits which are assigned to it.

Reference has also been made to another act which had passed previously, and said to form part of the local law of that colony, in which it is declared that they acknowledge no other law than the common law of England, so far as it stands unaltered by any written law of that island, or by some act of parliament.<sup>1</sup>

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<sup>1</sup> The act of assembly, referred to in the text, was passed in 1705, "for preventing tedious and chargeable lawsuits, and for establishing a constant and certain uniformity in the proceedings of the courts of the several islands under his government." It will be sufficient to cite the following section:—

"We, your Majesty's most dutiful and loyal subjects, the commander-in-chief of your

[ \* 126 ] \* Now this enumeration of their laws omitted a very material source from whence other laws were derived — that of legitimate custom ; and if even that should not be deemed a venial omission, it surely would be a gross abuse of all principle to say, that upon that account they should be deprived of their commerce, which every other island in that archipelago had uniformly possessed, and which the sovereign state had promoted and encouraged in all of them. It might not have occurred to the gentlemen of that island to insist upon custom, so protected, to be a source of laws ; and an omission of this kind, in describing the sources of law, can never have the effect of disabling that efficacy which has not only been exercised both before and since the framing of that decree, but has been guaranteed and protected, to the utmost, by the laws of the mother country, in common with the state of the other islands in the same part of the world.

Having adverted to most of the objections that arise to the revival of slavery in the colonies, I have first to observe, that it [ \* 127 ] returns upon the slave by \* the same title by which it grew up originally. It never was in Antigua the creature of law, but of that custom which operates with the force of law ; and when it is cried out that *malus usus abolendus est*, it is first to be proved, that, even in the consideration of England, the use of slavery is considered as a *malus usus* in the colonies. Is that a *malus usus* which the court of the king's privy council and the courts of chancery are every day carrying into full effect in all considerations of property, in the one by appeal, and in the other by original causes ; and all this enjoined and confirmed by statutes ? Still less is it to be considered a *malus usus* in the colonies themselves, where it has been incorporated into full life and establishment ; where it is the system of the state and of every individual in it ; and fifty years have passed without any authorized condemnation of it in England as a *malus usus* in the colonies. The fact is, that in England, where villenage of both sorts went into

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Majesty's Leeward Caribbee Islands, the general council, and general assembly of the said islands, now met at Nevis, do humbly pray your Majesty, that it may be declared, and it is hereby declared by the authority aforesaid, that the common law of England, as far as it stands unaltered by any written laws of these islands, or some of them, confirmed by your Majesty, or some of your royal predecessors in council, or by some act or acts of parliament of the kingdom of England, extending to these islands, is in force in each of these your Majesty's Leeward Caribbee Islands, and is the certain rule whereby the rights and properties of your Majesty's good subjects inhabiting these island are and ought to be determined ; and that all customs or pretended customs, or usages contradictory thereunto are illegal, null, and void." See Laws of Antigua, No. 31.

total decay, we had communication with no other country; and, therefore, it is triumphantly declared, as I have before observed, "once a freeman ever a freeman," there being no other country with which we had immediate connection, in which, at the time of suppressing that system, we had any occasion to trouble ourselves about. But slavery was a very favored introduction into the colonies; it was deemed a great source of the mercantile interest of the country; and was, on that account, largely considered by the mother country as a great source of its wealth and strength. Treaties were made on that account and the colonies compelled to submit to those treaties by the "authority of this country."<sup>1</sup> This system continued entire. Instead of being condemned as *malus usus*, it was regarded as a most eminent source of its riches and power. It was at a late period of the last century that it was condemned in England as an institution not fit to exist here, for reasons peculiar to our own condition; but it has been continued in our colonies favored and supported by our own courts, which have liberally imparted to it their protection and encouragement. To such a system, whilst it is so supported, I rather feel it to be too strong to apply the maxim, *malus usus abolendus est*. The time may come when this institution may fall in the colonies, as other institutions have done in other flourishing countries; but I am of opinion that it can only be effected at the joint expense of both countries; for it is in a peculiar manner the crime of this country; and I rather feel it to be an objection to this species of emancipation, that it is intended to be a very cheap measure here by throwing the whole expense upon the colony.

It has been said that the law of England discourages slavery, and so it certainly does within the limits of these islands; but the law uses a very different language and exerts a very different force "when it looks to her colonies; for to this trade in [ \* 129 ] those colonies it gives an almost unbounded protection, and it is in the habit of doing so at the present time in many exercises of public authority; and even since slavery has become odious in England, it has been fully supported by the authority of many statutes for the

<sup>1</sup> By the treaty of Utrecht, the assiento, a contract by which the royal Guinea Company settled in France had undertaken to supply the Spaniards with the negroes at a concerted price, was transferred to the English; and a new instrument was signed in May, 1713, to last thirty years, by which this country bound herself to send 4,800 negroes yearly to Spanish America. The assiento consists of forty-two articles; it is printed in the third volume (p. 375,) of a "Collection of Treaties of Peace and Commerce." 4 vols. 8vo. Lond. 1732.



purpose of carrying it into full effect in the colonies. All the efforts of the persons who have contended for the abolition of slavery in the colonies, and who have obtained many acts of parliament for the regulation of it therein, have in no degree weakened the force of those English statutes which so powerfully support it in the mother country.

It has been observed, that the sovereign state has declared, that all laws made in the colonies, contradicting its own law, shall be null and void, and cannot be put in execution;<sup>1</sup> but is that the character of the laws in the colonies for the encouragement of the proprietors of slaves? Has it not, since the declaration of its judgment against slavery, declared, in the most explicit and authentic manner, its encouragement of slavery in its colonial establishments? Have not innumerable acts passed which regulate the condition of slaves, and which tend to consider them, as the colonists themselves do, as *res positæ in commercio*, as mere goods and chattels, as subject to mortgages, as constituting part of the value of estates, as liable to be taken in execution for debt—to be publicly sold for such [ \* 130 ] purposes;<sup>2</sup> and has it not established \* courts of the highest jurisdiction for the carrying into execution provisions for all these purposes; and these its most eminent courts of justice—its Court of the King's Privy Council, and its courts of chancery, where all these regulations are carried into effect with the most scrupulous attention, and under the authority of acts of parliament? Can any man doubt that at this time of day slaves in the colonies may be transferred by sale made in England, and which would be affirmed without reference to the court so empowered; for the acts of parliament, including the recent Consolidation Act,<sup>3</sup> prescribe and regulate the manner in which these transfers of slaves are to be securely made in this kingdom, and the mode to be adopted where money is lent on mortgage upon the security of slaves; and how, under the guaranty of such protection, can it be asserted that the law of England does not support, and in a high degree favor, the law of slavery in its West India colonies, however it may discourage it in the mother country? Is it not most certain that this trade of the colonies has been the very favorite trade of this country, and so continues, so far as can be judged from encouragement given in various forms—the making of treaties, the institution of trading companies, the devolu-

<sup>1</sup> See 7 & 8 W. III. c. 22, § 9, and Black. Com. p. 107, *et seq.* Coleridge's edition.

<sup>2</sup> See 9 & 10 W. III. c. 26; 5 Geo. II. c. 7; 23 Geo. II. c. 31; 59 Geo. III. c. 120.

<sup>3</sup> 5 Geo. IV. c. 113, § 37.

tion of property from one company to another, the compulsion of the colonies to accept this traffic, and the recognition of it in a great variety of its laws? If it be a sin, it is a sin in which this country has had its full share of the guilt, and ought to bear its proportion \* of the redemption. How this country can decline [ \* 131 ] to perform the act of justice, in performing the act of charity, men of great wisdom and integrity have not been able to discover.

The example of France has been glanced at, which has adopted a more decided policy with regard to its colonial slaves. It certainly discouraged the entry of slaves into France, not permitting it, according to the first edict passed in 1716,<sup>1</sup> but by the permission of the governor or commandant of the colony; and that edict commands the slaves to return to the colonies at the instance of the master. But in the event of the master not having obtained permission for the slave to go to the mother country, in that case he was declared to be free. France did not, therefore, do as this country had done, put their liberty, as it were, into a sort of parenthesis; but it denied them freedom in France, and held them bound to their masters, if the regulations of the edict had been complied with by them. In 1738, an alteration took place by a further edict, whereby, if the regulations had not been attended to, the slave was not, as before, entitled to his freedom, but he became forfeited to the crown, to be sent back to be employed in the public works of the colonies.

Whether that is the footing upon which the question \* now [ \* 132 ] stands, I am not informed, and do not feel it to be of importance in determining the present case. I believe France has been more zealous in christianizing her slaves than we have formerly been; although this deficiency on our part has been most happily supplied by the mission of two most respectable prelates to superintend the spiritual concerns of these islands.<sup>2</sup>

England, the general sovereign of all her colonies, has been looking on with indifference, and permitting daily occurrences to pass under her eyes, without taking any steps whatever to correct them; and, with all the indulgence which has been shown to the efforts of gentlemen who have manifested a zeal for the emancipation of slaves, the system of law has been little relaxed. Our own domestic policy

<sup>1</sup> This edict is annexed to Boucaut's case, which, under the title of "*La Liberté réclamée par un Nègre*," is printed in *Les Causes Célèbres*, vol. xiii. p. 526-647. (Paris, 1739.) The edict formed part of the "*Code Noir*" of France, and extracts from it are appended to Sommersett's case. See *Howell's State Trials*, vol. xx. p. 12-15. For the edict of 1738, see *Commerce de l'Amérique*, tom. ii. p. 235.

<sup>2</sup> See 6 Geo. IV. c. 38, amended by 7 Geo. IV. c. 7.

continues to be actively employed, in supporting the rights of proprietors over the persons committed to their authority in the character of slaves.

It cannot be denied that cases have been mentioned by Dr. Lushington, I know not to what extent they prevail, but in any extent they are cases which must excite the sympathy of every considerate man, and call for remedy to be administered by the mother country, if it is not supplied by the colony itself. That persons, brought up with the expectation of considerable wealth, acquired in this or other countries, should be subjected to the reverses of fortune which may befall them, upon visiting the country of their parents at an [ \* 133 ] advanced period of life, is a most severe hardship; \*that they should be compelled to submit to the humiliation which may attend them in any acquired situations, upon such return, is to be much lamented; but these are matters happily within the power, and certainly within the justice, of parliament to remedy by some general correctives. Lord Mansfield, I observe, recommended to the merchants to make application to parliament for any purposes which they might deem requisite on the subject. It cannot, I think, be denied, that there are purposes for which such an application might be deemed eminently useful. Cases in which the representatives of families, who have acquired property in England or elsewhere, and who have returned at a very mature age to those islands, are certainly very fit objects to be relieved from a state of interminable slavery; for a return to a condition of slavery must operate upon them and others, who are at all under similar circumstances, with an unjust severity; and, at any rate, the humanity of parliament could not be employed to a more beneficent effect, if the colonists themselves should neglect to interfere.

I am very sensible that there are many great and important questions, touching our empire in that part of the world, much connected with the questions which I have ventured to examine, and which lie beyond the power of any consideration of my own, or perhaps of those gentlemen who have adverted to the same subjects, but with a result which I am compelled to oppose. How far, for instance, a law can be deemed legal and constitutional which authorizes a custom-house officer to seize a person described to such officer as a [ \* 134 ] free person, and to inflict upon him the degrading \* process which the law compels him to use in respect to slaves, are questions that exceed the competency of my powers, and, possibly, even of those who have framed regulations upon these important subjects. There are also other points deserving of attention. It is known that there are estates abounding with slaves, which are in

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The Osiris. 2 Hagg.

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mortgage by special contracts to residents in this country, commonly English merchants, parties who can bring as many of these slaves as they think fit over to England, and by that means rid themselves of the security which they had given to the mortgagees. These, and many other questions deeply affecting the value of West India estates to persons in England, as well as in the colonies, are questions of very serious import, and entitled to the attentive consideration of the legislature.

These are the conclusions to which I have arrived, after a very full and mature consideration of the subject. I can truly say, that I arrived at those conclusions with a mind free from any prepossession upon the subject, and with the determination to attend to nothing but the fair result of the evidence which applies to it. I am sensible that other opinions may be formed upon the question; but, in affirming the sentence of the judge of the court below, I am conscious only of following that result which the facts not only authorize, but compel me to adopt.

Sentence affirmed, with costs.

NOTE. May 6, 1828. The provisions of the 5 Geo. IV. c. 113, s. 34, (in respect to slaves restored upon appeal,) having been complied with, the court, in order that the claimant might obtain the costs and damages decreed at Antigua, remitted the cause.

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\* OSIRIS, Shaken.

[ \* 135 ]

December 13, 1827.

On an appeal from an award of magistrates in a case of salvage, the court declined to admit further affidavits, and confirmed the award.

THIS was an appeal by the salvors from an award of 100*l.*, given by three magistrates at Penzance, for services to the Dutch ship *Osiris*. In addition to the evidence before the magistrates, the appellants introduced ten affidavits. The value of the ship and cargo was 3,700*l.*

*Dodson* and *Addams*, for the owners. These new affidavits cannot be received, and the reward is quite ample.

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The William Money. 2 Hagg.

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*Lushington, contra.* The salvors state that the magistrates declined to receive further evidence. Even the facts admitted before them entitled the salvors to a larger reward.

COURT. The whole evidence should have been produced before the magistrates. It would seem as if the salvors waited till this foreign ship was out of the way. I should be very reluctant to hear an appeal of this sort upon evidence not before the original tribunal; for how could this court censure magistrates upon affidavits of which they knew nothing? I see no reason to disturb the award, but I shall not give costs.

Award confirmed.



[ \* 136 ]

\* WILLIAM MONEY, Jackson.

December 13, 1827.

A seaman who had elected to take at Calcutta a bill of exchange on the owners, instead of cash, in payment of wages, cannot sue the ship, on payment of such bill being refused, the owners having become bankrupts.

THIS was a suit for wages brought by William Moakes, late second mate of the above ship. The petition alleged, "that the ship's agents at Calcutta paid him his wages partly in cash, and partly by a bill of exchange upon the London owners, who had refused payment, and were bankrupts." A responsive plea alleged, "that the mate was tendered his full wages in cash; but that, being desirous to remit money to England, the agents, at his request, gave him a bill for 40*l.*, payable six months after sight, on the owners in London."

*Lushington*, for the mariner, opposed the allegation. It is not disputed that 40*l.* are still due for these wages; but the question is as to the mode of payment—whether Moakes can sue the ship, or whether he must prove under the commission of the owners' estate? The agents are also bankrupts. If Moakes had chosen to take a bill of exchange on a firm not connected with the ship, it might be argued that he had preferred other security, and had quitted his remedy against the ship and her owners; but here the bill was drawn upon the owners themselves, by their own agents.

*Dodson, contra.*

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The Dundee. 2 Hagg.

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Court. It is pleaded that this man might have taken his wages in money at Calcutta; but instead of the money, he preferred a bill of exchange as an accommodation to himself. He then made his election, and must stand by the risk. I admit the allegation.

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\* DUNDEE, Holmes.<sup>1</sup>

[ \* 137 ]

December 13, 1827.

In a cause of collision, where payment of a sum for damage, interest, and costs reported to be due, had been delayed by the party liable, the other party is entitled to interest on the whole sum from fifteen days after the date of such report, and stat. 53 Geo. III. c. 159, s. 1, limiting the liability of owners to the value of the ship, appurtenances, and freight, applies only to the original claim for damage, and extends not to costs and interest.<sup>2</sup>

THIS was originally a cause of collision. The owner of the Dundee, after a sentence against him in the Court of Admiralty upon the extent of his liability under the 53 Geo. III. c. 159, applied for a writ of prohibition; but the Court of King's Bench refusing to interfere in that summary way, directed the plaintiff to declare, and ultimately gave judgment for the defendant.<sup>3</sup> A writ of consultation was thereupon brought into this court on the 14th of May, 1827.<sup>4</sup> The subsequent proceedings are detailed in the report of the registrar and merchants upon matters referred to them by the court, namely, — That on the 28th of January, 1823, the report of the registrar and merchants, dated on the 7th of May, 1822, and decreeing to Laurie & Co., the owners of The Princess Charlotte, the parties promoting this suit, 4,554*l.* 12*s.* 6*d.*, including therein 350*l.* for interest, with further interest from the date of the report till payment, and also exclusive of the proctor's bill of costs, not then produced and taxed, was confirmed; that on the 12th of June, 1827, the proctor's bill of costs, reported at 435*l.* 14*s.* 10*d.*, \* was, after argument [ \* 138 ]

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<sup>1</sup> See vol. i. 109.

<sup>2</sup> [The John Dunn, 1 W. Rob. 159.]

<sup>3</sup> Gale v. Laurie, 5 B. & C. 156.

<sup>4</sup> The material part of the writ was as follows: — It is considered by the Court of King's Bench, that the fishing stores on board The Dundee at the time of the loss and damage were part and parcel of the said ship's appurtenances and freight, according to the true intent and meaning of the 53 Geo. III. c. 159, and that the Admiralty Court may proceed in the suit.

of counsel, confirmed;<sup>1</sup> and the judge referred back to the registrar and merchants the report of the damages sustained by the owners of The Princess Charlotte, to consider what further interest was due in addition to 4,554*l.* 12*s.* 6*d.* awarded to them under that report; accordingly the registrar now stated, that, in the opinion of the merchants and himself, a further sum of 930*l.* 7*s.* 6*d.* was due for interest from the 22d of May, 1822 (being fifteen days after the date of such former report) until the 30th of June, 1827, at four per cent. per annum; and also the sum of 26*l.* 16*s.* for interest on 120*l.* paid in advance for costs by the claimants to their proctor, from the 24th day of November, 1821, to the 30th day of June, 1827; and 435*l.* 14*s.* 10*d.*, being the amount of the bill of costs, to which sums collectively was to be added further interest from the 30th of June, 1827, together with any costs incurred since the taxation.

The value of ship's tackle, furniture, and fishing stores was 4,921*l.*, and the total sum thus reported to be due was 5,947*l.* 10*s.* 10*d.*

*Pickard*, in opposition to the report, made three objections: — 1st, That the effect of the report was to give compound interest — interest upon interest — inasmuch as the 930*l.* 7*s.* 6*d.*, allowed for interest on the amount of the former report, included interest upon [ \*139 ] the 350*l.* already given for that purpose \* upon the amount of damage sustained. 2d, That interest on a bill of costs was illegal; and on this point he cited *Butler v. Burk*, 14 Viner, tit. Interest, (C.) 9. 3d, That whatever might be the opinion of the court upon the two first points, the whole amount was controlled by the 53 Geo. III. c. 159, s. 1, under which statute the responsibility of the owner was limited, and could not exceed the agreed value.

*Arnold and Lushington, contra.*

One of the items in the former report is 350*l.* for interest: in the further report interest is allowed on the whole amount of the former report, including that item: this is said to be compound interest, or interest upon interest, which ought not to be allowed. And it is admitted that such ought not to be allowed in a common, ordinary, and current account: but when an account is settled, such interest as

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<sup>1</sup> On one side it was moved that, the proceeds having been in possession of the plaintiff in prohibition, the report should be referred back to adjust what further interest was due, and at what rate; and, on the other side, that, the delay not being imputable to the plaintiff, no interest should be allowed pending the proceedings under the writ of prohibition.

makes part of that account becomes principal, and, in a further account between the parties, interest is to be charged on that as on the other items. That interest is due at the settling of the account equally with the other items; and the withholding of interest upon it would be equally a loss and detriment to the other party as withholding it on the other items. Such charge of interest is according to the usage of merchants. It is also the practice of the Court of Chancery. "Interest shall be allowed for the balance of a stated account, though interest is computed in the account."<sup>1</sup> And the practice of this court agrees with it. In *The Driver*, 5 Rob. 145, the court said:—"The usual rule, undoubtedly, \* is [ \* 140 ] not to give interest on interest; but when interest has been given, and the account is made up, the interest then becomes principal, on which it is not unreasonable that further interest may be decreed, similar to what is done in the Court of Chancery."

The second objection is, that interest is allowed on money stated to be advanced by the proctor to his party. But this was money advanced and actually paid. If interest be not allowed on it, the party will suffer loss to the amount of the interest, as if he actually paid so much more money: he, therefore, is entitled to have this allowed as part of his costs and charges.

The third objection is to the amount of the report, which is 5,947*l.* 10*s.* 10*d.*; and it is stated that by 53 Geo. III. c. 159, no ship owner is liable for loss or damage done by his ship beyond the value of the ship, its appurtenances, and freight: the value, in this case, is 4,921*l.*; therefore the party is not liable beyond this sum. But the answer is, that the claimant is entitled, under the statute, for compensation for his loss to the amount stated. He is also further entitled to such costs as he shall incur in recovering this compensation; and to interest, if payment be delayed: and the excess of the report, above the value alleged, consists of these items. First, as to costs, wherever compensation is due, the claimant is entitled to be reimbursed the costs of obtaining it, otherwise he will not obtain his full right; that will be diminished by the amount of the costs. Therefore, by the practice of this and of all other courts, costs are given in such cases. The statute limits the amount of compensation. It does not enact that this shall \* be taken in full for the loss, and [ \* 141 ] also for the expenses of recovering against the wrongdoer; this cannot be the meaning and intent of the statute; it would be unjust, and lead to litigation and fraud: it would allow one party to

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<sup>1</sup> 2 Com. Dig. tit. Chancery, Interest, (3. s. 3.)



protract litigation at the costs of the other. Some clauses of the statute mention costs over and above the compensation for loss. It has provided, by the 7th section, that the ship-owner may file a bill in chancery to restrain suits against him, then the value is to be brought into court, and the court may make order to complete the payment. And the 8th section enacts, that the court may also direct security to be given for the costs of the suit. The 16th section provides that sums, paid for compensation, and for costs incurred, may be made matter of joint account between joint owners. If the ship-owner pay to the claimant the value according to the statute, without litigation, he is protected from further demand; but if he oblige the claimant to incur costs and charges to recover this, he must pay those costs, or the claimant does not obtain the compensation which the law allows him. Secondly, as to interest. If payment be delayed, the claimant is entitled to interest, or he will suffer loss; and this is a new loss, distinct from his original loss for the damages done, and not within the statute; for the statute cannot mean that the ship-owner shall pay only the value of his ship, and be allowed to withhold payment of that, as long as he thinks fit, without interest; this would be palpably unjust and absurd. If he pay the compensation allowed, when due, he is discharged; but if he withhold payment, he, like all other [ \* 142 ] debtors, is liable to interest. When under the \* statute the value is brought into chancery, by the 13th section all interest and profit made thereof shall be considered as belonging to the parties who shall appear entitled to the principal. The position on the part of the ship-owner claiming exemption from costs and interest amounts to this, that the one party may carry on a litigation at the expense of the other, and have the advantage of retaining the money to his own use and benefit, as long as he can protract it; and the present suit is an example of what may be expected if this could prevail. The value allowed by the statute would have nearly compensated the loss sustained, and the costs, when the account was first settled. The greater excess, now objected to, has arisen from the protraction of the case. Under these considerations, it is submitted that the further report, charging costs and interest, ought to be confirmed.

COURT. I have no doubt upon this subject; but I wish to consider it a little further, and will communicate the grounds of my opinion. That opinion was expressed in the following terms.

#### JUDGMENT.

LORD STOWELL. The justice of this case lies entirely with the

counsel who have argued on the part of those who have sustained the injury, and who apply for full restitution. It is objected, in the first place, that 350*l.* is stated for interest; and that in the further report interest is allowed on the whole amount of the former report, including that item. This, it is argued, is compound interest — interest upon interest, and ought not to be allowed. To which it is answered, with perfect justice, and conformity to the practice of all courts, that where \*interest is so settled it shall [ \*143 ] bear interest thereon, and that the same shall not be deemed a compound interest, charging the party with an unfair pressure in such account. It is agreeable to the practice of merchants, and agreeable to the practice of the Court of Chancery, and has been so held in this court. Where interest is made up, it then becomes principal, and bears interest as part of the principal.

The next objection is, that interest is ordered to be paid on the costs, which is unjust, and ought not be allowed; to which it is answered again, with perfect justice, that the costs to which the party is put are a part of his loss, and which would not be compensated unless these costs were allowed.

The third objection rests upon the stat. 53 Geo. III. c. 159, s. 1, by which no ship-owner is liable for loss or damage done by his ship beyond the value of his ship, appurtenances, and freight. The value in this case is 4,921*l.*; therefore the party is not liable beyond that sum. To which it is answered, that the sufferer is further entitled to such costs as he shall incur in recovering this value, and to interest if payment be delayed. And the excess of the report above the value stated consists of these items. The claimant is entitled to remuneration for the costs to which he is driven for recovering his loss; they certainly form a part of that loss, and the statute is not guilty of that injustice which would ensue if it excluded those costs that are necessary for replacing the sufferer in a just state of compensation. If the party is reinstated in the value of the property, without litigation, there is no demand for costs; but if he cannot obtain the benefit of the statute, in respect to compensation, without being driven to the necessity \* of a suit, the statute would be charge- [ \*144 ] able with great injustice if it did not admit the payment of these costs, and accordingly they are mentioned in several parts of the statute. And it was justly remarked, that if without payment of interest the wrongdoer could retain the money due to the sufferer, he might apply it to the purposes of an unjust and persevering litigation.

I sustain the report and costs.

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The Catherine of Dover. 2 Hagg.

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**MEMORANDA.** In the course of the Christmas vacation, Lord Stowell retired from the chair of the High Court of Admiralty, where he had presided since Michaelmas term, 1798. He was succeeded by

Sir *Christopher Robinson*, Knight, the King's Advocate, who was sworn a member of his Majesty's most honorable Privy Council.

*Herbert Jenner*, LL. D. was appointed to the office of King's Advocate, and was knighted.

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[ \* 145 ]

\* CATHERINE OF DOVER. Davison.

March 21, 1828.

In a cause of collision the crew of the ship, charged with committing the damage, admitted (on the ground of necessity, and that no other evidence could be expected) as witnesses, though, being sharers in the profits and losses of the vessel, they would not swear they were disinterested in the result.

In a cause of collision, where the loss was charged to be owing to wilful malice or gross negligence, the court, with the assistance of Trinity Masters, being of opinion that the damage was occasioned by accident chiefly imputable to the mismanagement of the vessel lost, and not to the misconduct of the other vessel, dismissed the owners of the latter vessel with costs.

THIS was a cause of collision brought by the owners of *The Dart*, a Deal pilot-boat, run down by *The Catherine*, while negotiating to pilot a Hamburg galliot. One of the crew of *The Dart* was drowned. The value of the boat was laid at 250*l*. When the pleadings were opened, *Addams*, for *The Dart*, objected to the evidence of *Sladen* and two other witnesses, on the general principle that persons having an interest were incompetent witnesses.<sup>1</sup> *Lagden v. Flack*, 2 Consistory Reports, 303.

The consideration of the objection was reserved till the evidence

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<sup>1</sup> Richard *Sladen*, on the 2d interrogatory answered : — "He is not an owner but a sharer in the profits and losses of *The Catherine of Dover*, to the amount of one seventh. His fellow witnesses have each a similar share. *William Davison*, the master of the said lugger, is the sole owner. Respondent cannot swear that he is wholly disinterested in the event of this suit, because he does not believe that if *Davison* should lose this cause, he, the respondent, will be called upon to contribute one seventh part or share of what the loss may come to ; but he looks upon it that he shall not be a gainer whoever may get the cause. Respondent became a sharer in *The Catherine* just after she was launched, but his share has not always been so much as at present."

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The Catherine of Dover. 2 Hagg.

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was about to be read, when, after argument, the court observed : The interest is not direct ; it is a resulting interest merely depending on the employment of the vessel. It is denied that the witnesses have any interest in the property ; they may be liable to repairs and to other incidental \* expenses, though it does not appear [ \* 146 ] that, as shareholders in the navigation of the vessel, they could be required to contribute to the reparation of this injury. A distinction is commonly recognized, that a witness is not, at law, incompetent merely on the ground of his believing himself interested. The Court, therefore, would require more authority than has yet been adduced, to convince it that the parties had such an interest in this suit as will render them incompetent.

But the ground of necessity is still stronger. Here was an occurrence at sea, in which one boat alleges a serious charge against another, on facts capable only of being spoken to by the respective crews ; and could it be supposed that the court would decree reparation against a party unheard, or upon the evidence alone of the adverse side ? The interest also of the crew of The Dart is nearly as strong : they admit their habits of employment in that vessel, and their apprehension of a loss of wages till another boat can be procured. If the case had come before me on petition supported by affidavits, according to the usual form of such cases, each party would have told their own story. Cases of necessity are held to constitute an exception ; as, in respect to freemen of corporations, where none but freemen know the facts, and yet may have an incidental interest in the question. On these grounds the court directed the evidence to be read *de bene esse*, and intimated that it would, if required, hear a further argument on its admissibility.

The objections were renewed on the next session.

March 28th. *The King's Advocate and Addams.* The \* admitted interest is clearly an interest in the result of the [ \* 147 ] trial ; although Davison is described as sole owner, there are shares in the profits and losses assigned to the mariners ; and one share has been put aside to answer the costs of the suit. The witnesses will not swear they are not interested, as they expect that Davidson will call upon them to contribute. *Amitié, Villeneuve, 5 Robinson, 544.*

*Phillimore, contra.* . The interest, if any, is uncertain and not sufficient to disqualify. In cases of this description witnesses are admitted in the Court of Admiralty from necessity.

## JUDGMENT.

SIR C. ROBINSON. It is not my intention to leave the parties who have taken the present objection in doubt as to the decision of the court on this point, as it is due to them that they may know on what grounds to seek their remedy in the superior court, in case they shall be advised to appeal. If the judgment of the court depended only on a construction of the interest imputable to the witnesses under their own account of the agreement which subsists with the master, and of their own belief, it might be less satisfactory; as it would amount only to this, that the court does not think the interest to be so clear, as has been contended; and that in a case of doubt, it would be disposed to admit the evidence rather than to exclude it. There is certainly no direct interest of ownership; and it is probable that if the witnesses had been interrogated accurately as to their agreement, it would have come out that the engagement for profit, loss of repairs, and incidental expenses, did not include a [ \* 148 ] \* responsibility for consequences, like this of imputed misconduct charged against the owner.

The distinction as to belief of legal interest, and interest in bounty, is not very satisfactory, as it may be in the power of the courts, on proper interrogatories, to remove any erroneous impression of legal interest, and to direct the persuasion of the witness rightly on that point: whereas the reliance on bounty merely is not capable of being so counteracted. It is, however, on the principle of necessity (which has been always admitted to form an exception to the objection of interest) that the court rests its judgment. Objections to competency on the ground of interest are sustained in order that evidence may be obtained free from bias; but if, to effect this, a court excludes the only proof that can be offered by the defendants, the principle is destroyed, by transferring the bias to the other side, and by hearing the case on *ex parte* evidence alone.

In this case, the acts and words of the crew of The Catherine are brought forward by The Dart to support the charge of wilful or negligent conduct: it is impossible to estimate this evidence without allowing the only men that were on board The Catherine to speak in their own defence. The accident happened on the 1st of March, and the action was not instituted till the 30th. The Galliot had left this country; so that no witness could be produced from that vessel. It is, then, under these peculiar circumstances that I think it essential to the purposes of justice that these witnesses should not be excluded.

If evidence had been, or could have been, produced from The

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The Catherine of Dover. 2 Hagg.

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Galliot, on one side or on the \* other, I certainly should [ \* 149 ] not have admitted witnesses liable to this objection of interest. But the necessity of the case justifies the exception ; and this is the ground of my judgment. That ground of exception is recognized in all books. Mr. Justice Buller in his *Nisi Prius*,<sup>1</sup> states it, "as the third exception under the general rule, that a party interested will be admitted where no other evidence is reasonably to be expected ;" and he cites a manuscript case very similar to the present. It is an authority directly in point ; and I think myself bound to act upon it by receiving the depositions of these persons.<sup>2</sup>

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<sup>1</sup> Page 289.

<sup>2</sup> The editor has been favored, upon this subject, with two cases from the notes of Dr. Arnold.

THE PITT.

May 26, 1791.

In a cause of salvage, two persons, plaintiffs, as part of "the crew of the ship," on signing releases, dismissed to be examined as witnesses.

THIS was a petition to dismiss two parties, who were plaintiffs, under the general description of "crew of the ship," in order to produce them as witnesses. They had given in their answers, and had executed releases of their claim to any share of salvage.

*Sir W. Scott.* An indulgence is given, in such cases, from necessity, as the only evidence can arise from the salvors or the persons saved, — both in some measure parties. The rules of evidence are, here, necessarily lax, though the witnesses are open to observation on their credit ; and I see no objection, but that it may weaken the security of the other party for costs. It is usual to dismiss defendants ; but it is not so usual as to the plaintiffs, though it is sometimes done. The principle is that justice may be effected, and the truth of the facts laid before the court. No objection can arise on the ground of interest, for the parties have released.

*Dr. Swabey,* on the same side. These parties are as competent as a legatee who has released. It may be doubted, whether they might not, on a release, be witnesses without a dismissal. In joint capture every sailor on board is a competent witness ; and, in those cases, the men are as much interested and as much parties as in these ; but, on release, no objection is ever taken to such testimony. If a suit were in the names of a master and crew of one ship, against the master and crew of another, the crew might be examined. Testamentary cases are brought in the name of the executors ; where their testimony is wanted, on renunciation, it is admitted ; so frequently this occurs that I do not remember it to have been argued in opposition. *Berry v. Staples* is a recent case, in which a co-executor — the writer of the will — prayed to be dismissed upon an affidavit that he would be a material witness. The question gave rise to no argument, for the opposition was dropped. In 1765, *Cawood v. Badger* : will opposed

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The Catherine of Dover. 2 Hagg.

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[ \*150 ] \* The case was then argued on the merits; after which the court addressed the Trinity Masters to the following effect:

[ \*151 ] \* It is now, gentlemen, my duty to premise briefly some

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by next of kin: proxy of three executors propounding it: after which one renounced, and prayed to be dismissed as a necessary witness. This was opposed by the next of kin, because, if dismissed, the sentence would not bind him. To this it was answered by *Dr. Wynne*, and sustained by the court, that such executor would be bound, if the proctor took out a decree against him to appear.\* And in that case the court quoted *Beaumont v. Sharp*, delegates, 1752, where it was held that a party, though voluntarily so, might be dismissed in aid of justice on a mere averment that he was a necessary witness to support a will. There was, in that case, no affidavit; the only question was if the party was a necessary witness: and he was dismissed in order to become a witness. In maritime causes the strict rules of testimony are relaxed.

*Dr. Nicholl, contra.* The parties are interested as to costs. No security is given to answer such interest, and to exonerate them. The owners have a right to their answers, by which they may furnish evidence against themselves. In all the cases cited the parties were necessary witnesses. I can furnish an additional case. In *Godfrey v. Petit*, a legatee had intervened for his interest. On an affidavit that the evidence of the legatee was necessary to prove a fact, he was dismissed and made a competent witness. Here no necessity is shown but by the affidavit of a fishmonger. How does he know what "necessary" means? It will be dangerous to examine these parties as witnesses, being well acquainted with their own case. There may have been passengers on board, then no necessity can exist. The single ground for dismissal, where it has been done, has been that such parties were the only witnesses to the facts wanted to be proved.

*Dr. Laurence*, on the same side. The point on which a necessity is grounded, has been specifically alleged in all the cited cases. In *The Sara Barnardina* the parties were admitted as witnesses, without dismission.

*In reply.* The word "necessary" is not a technical word; it is open to the understanding of any one: it means a witness without whose testimony material facts cannot be proved. If the other side cannot have answers, they can administer interrogatories: we are willing to undertake for costs.

#### PER CURIAM.

SIR JAMES MARRIOTT. The affidavit of the fishmonger is only as to his belief; it is no more than the allegation of a proctor in the cause; and I lay it out of my consideration. Then the question is, whether the examination of these parties is materially necessary? Cases have been quoted to show that persons interested may be examined; and they may be, in many cases, *ex necessitate rei*. In prize cases the captured are examined. In France the examination of the captors also takes place. The court always endeavors to exclude biased witnesses; but it must sometimes admit them: the court is to judge of the necessity. There will be no hazard in admitting this testimony to be received.

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\* See *Wood v. Medley*, 1 Hagg. Eccl. Rep. 645, 482.

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few observations on the point to which your \*judgment [\*152] should be directed. It is a case in which a pilot boat is

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SARA BARNARDINA.

June 8, 1790.

In a cause of salvage, by plea and proof, interested witnesses admitted on the ground that they were the only witnesses.

THIS was a suit for salvage. The vessel was going on a voyage in the whale fishery, and had anchored, in danger, on the coast of Norfolk, when, upon a signal of distress, The Pitt, with Lash, the master, and six others on board, went out to her assistance. The master, mate, and some of the foremast men of The Pitt, had been examined: it was admitted they were on board.

*Dr. Nicholl and Dr. Laurence*, for the owners. Here is no competent evidence; every one of the witnesses is a party, and has an immediate interest in the cause. The warrant was taken out in their names, and the suit has been instituted in their names. Lash, on interrogatory, says he is interested; and though he has released, he is liable to costs. In the Prerogative, a nude executor, without any interest, has been repelled. Prior to examination, he must be dismissed regularly from the suit. All the other witnesses here are parties. On interrogatory, they swear they are neither parties nor interested; but they could not have understood the nature of the question.

*Sir William Scott, contrò*. The rules of the Admiralty Court are not to be narrowed to those of the common law, well suited to those courts. I rely on the practice of the Court of Admiralty. Cases of salvage are generally brought on the affidavit of parties interested. There is no cross-examination. *Necessitas rei* is allowed to make an exception where the necessity appears. It has been said, the crew of the ship salvaged might have been examined; but their examination would have been unnecessary, since the service is admitted, and they could not depose to what forms a great part of the case, namely, the hazard of the parties assisting.

PER CURIAM.

SIR JAMES MARRIOTT. The evidence is only on one side. The six witnesses are all interested and parties. An agreement is asserted on the other side, but no allegation. A tender has been made, by which it is admitted that a service was done. An objection to the witness is now taken. The quantum of salvage is the question — hard to get at it. General rules are, in certain cases, to be departed from. In maritime cases, where no other witnesses are present, the court must arrive at the truth by evidence of parties saved or saving: both are interested. In prize cases here, we examine only the crew of the captured vessel. In France, both are examined. Cases of salvage begin with affidavits; such are held to be evidence. In *The Esperance* 1,000*l.* was given on such evidence.

An offer has been made for pilotage; but these persons are not pilots. They go out of their course; delay ensues, and danger likewise of consequences from situation. There is no rule as to salvage. The business took two or three days: 30*l.* is not sufficient. I will not reject the evidence; nor determine on it if the owners choose to plead and prove an agreement. It will be for me to consider afterwards how the evidence shall weigh.



[ \*153 ] alleged to have been run down by \*another boat; and the court is called upon to award reparation against that other boat, as the culpable cause of the misfortune — owing either to the wilful malice or gross negligence of the master. It will require therefore a preponderance of evidence to justify such a conclusion ; and the court will be directed principally by your judgment in deciding whether the facts relied on do constitute such a case. The libel is framed in the alternative ; charging circumstances from which positive malice and design are inferred, or culpable negligence. It is rather disadvantageous to the case that the accusation has been so framed ; because, as the death of one of the mariners has ensued, if wilful design could be imputed, according to the plea, and according to some of the evidence, it would be a case for trial in the criminal jurisdictions of the country.

The opinion of the court will be founded chiefly on the nautical evidence, and it will scarcely be necessary to advert to those articles which plead previous animosities between the parties, and declarations of ill will, as leading to the conclusion that this injury [ \*154 ] was designedly perpetrated. If the \* nautical evidence should lead you to think that the conduct of The Catherine was not justifiable, such collateral matter supply a motive or inducement, accounting for the misconduct, but it can hardly go further. You may therefore safely confine yourselves to that evidence, advert-ing only to other matters so far as in your opinion they may affect the credibility of the witnesses. The result of the evidence will be one of three alternatives : either a conviction in your mind that the loss was occasioned by accident, in which case it must be sustained by the party on whom it has fallen ; or a state of reasonable doubt as to the preponderance of evidence, which will have nearly the same effect ; or thirdly, a conviction that the party charged with being the cause of the accident is justly chargeable with the loss of this vessel, according to the rules of navigation which ought to have guided them. It is with great satisfaction that the court can refer to gentlemen of your experience upon these points.

The *Trinity Masters* expressed their opinion — That the loss was occasioned by accident, imputable chiefly to the improper movement of The Dart, and in no degree owing to the misconduct of The Catherine.

COURT. I adopt this opinion with perfect satisfaction ; and as costs must have accompanied an award of damages, it is equitable that the defendant, in being dismissed from this suit, should be protected from the expenses he has incurred.

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The Sir Francis Burton. 2 Hagg.

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\* SYLVAN, Bell.

[\* 155 ]

April 22, 1828.

In a cause of collision, the court will, preparatory to a decree of sale, sign a *primum decretum*, on an affidavit of a perishable condition.

An affidavit sworn in Scotland before a commissioner for prize bail, is irregular.

THIS was a case of damage by collision, in which The *Sylvan* had been arrested in an action entered at 10,000*l.*; and no appearance having been given on the part of her owners, the court was now moved, preparatory to a decree of sale, to sign the *primum decretum* on an affidavit that the ship was in a perishable condition.

COURT. There is, I believe, no instance of such a decree in a case of collision, but it does not appear to me objectionable in principle. The process of the court naturally leads to such a result, when it becomes necessary, in this class of cases as well as in others. The affidavit has been sworn in Scotland, before a commissioner for taking bail in prize causes. This is irregular, since it has been usual to require such affidavits to be made here, or to be taken upon commission. Upon this informality being removed, by a fresh affidavit, I shall direct this motion to pass.

Motion granted.

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\* SIR FRANCIS BURTON, Hare.

[\* 156 ]

April 22, 1828.

In a cause of mixed military and civil salvage against the owners, the court is unwilling, though no bail has been given, to disturb a valuation, not clearly excessive, made under a reference on the spot to three arbitrators chosen by the salvors and consignees of the vessel.

War salvage, being generally fixed at a low rate, may, on special services, in the nature of civil salvage, be increased.

THIS English vessel in the port of Sagua, in the island of Cuba, was attacked by pirates. A conflict ensued, in which they were driven off; but the master was severely wounded, and the next day he was carried up to Sagua. The ship was attacked again and plundered by the pirates. In that state, deserted by her crew, she was found by the boats of H. M. S. *Espiegle*, (Yates, commander,) which,

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The Sir Francis Burton. 2 Hagg.

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with twenty-six men, came to her assistance. They brought back the crew, recovered the sails, refitted the vessel, and, at the request of the master, (still apprehensive of the pirates,) convoyed the ship eighty miles, to a place of safety. The crew were employed in these services about fifteen days.

On a claim for salvage at the Havana, the consignees of the vessel had consented to submit the claim to the arbitration of three persons, one of whom was the agent of Lloyd's at that port. The ship was valued at 780*l.*, and the arbitrators gave one third. It appeared afterwards that the ship had incurred such heavy expenses that there were no means of paying the salvage; and the consignees gave up the papers to the salvors, and referred them to the owners of the brig in London.

They were accordingly cited to show cause why the salvage awarded should not be pronounced due to the commander and the rest of the officers and crew of *The Espiegle*, and they appeared to the monition.

[ \* 157 ] \* *Phillimore*, for the owners. The appraisement is beyond the real value, and the allotment of salvage is excessive. The vessel was not worth more at the Havana than 400*l.*; 700*l.* had been laid out upon her there, and she is now to be sold for 600*l.* To a king's ship, one third is an extravagant rate of salvage, when, for war salvage, one eighth only would have been allotted.

*Lushington, contra.* In *The Betsey*, Winpenny, 5 Rob. 295, this court refused to reduce the estimate on which the ship had been taken out of the possession of the salvor on bail. The owners are not now competent to dispute the appraisement, and the court will adhere to the valuation and to the award. There is, in this case, an union of military and civil salvage.

*In reply.* In the case of *The Betsey*, the valuation was made by the parties themselves.

#### JUDGMENT.

SIR C. ROBINSON. Every thing has been done most beneficially for the owners, under the superintendence of their own agents, assisted by the agent of Lloyd's. If bail had actually been taken so as to bring the present case within the case cited, there would have been sufficient to induce the court not to disturb what had been done, as it would be unwilling to discourage the settlement of such questions on the spot, in a fair and liberal manner. The valuation does not

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The Malta. 2 Hagg.

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prove that the estimate was excessive with reference to the value of the vessel at the Havana ; she might, perhaps, have an opportunity of earning a freight. In respect to the other point, war salvage has always been considered as fixed at a low rate, and has been increased \*on special services. The difficulty arises chiefly [ \* 158 ] from the small value of the property under consideration ; but, upon the whole, it will be most advisable to give a specific sum, abating something in the estimate. The court, therefore, give 200*l.*, with the expenses.

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MALTA, Young.

April 22, 1828.

Though, under the principle that freight is the mother of wages, mariners lose their wages by an interruption of the voyage from accident, the condemnation of the vessel for illegal trading on the part of the master, to which the mariners are not parties, does not work a forfeiture of wages, nor even bar the mariners of their action against the owners ;<sup>1</sup> and charges of disobedience, neglect of duty, of intoxication and mutiny, not being established, wages pronounced for.

In a suit for wages, service and good conduct are to be presumed till disproved.

A single instance of intemperance does not work a forfeiture of wages ; it must be a habit, to produce that effect.

An information against the vessel for trading in slaves, by the mate, not appearing to be a false or malicious act, cannot work a forfeiture of wages.

THIS was a suit for wages brought by John Walker, late mate on board The Malta, against the owners, Messrs. Ramsden & Booth, of Liverpool. The summary petition stated the services of the mate, and the circumstances under which the vessel had been seized by Captain Willes, of H. M. S. Brazen, and condemned at Sierra Leone for a breach of the slave abolition acts. The admission of this summary petition was opposed on the general principle that wages were not due till the arrival of the vessel at her final port of destination ; and upon the grounds that it was the first claim of the kind, and that the remedy of the mate was against the ship itself, or proceeds arising from the sale of the ship, which were in the registry of the Admiralty Court. Lord Stowell having admitted the petition, reserving the question of law, an allegation on the part of the owners, charging the mate with disobedience, neglect of duty, intoxication, and mutiny,

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<sup>1</sup> [The Saratoga, 2 Gall. 164, 175 ; Pitman v. Hooper, 3 Sumn. 286.]

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was admitted without opposition. Upon the summary petition, three mariners were examined. Upon the allegation, the master [ \* 159 ] was examined, and \* it was submitted that his evidence was given under a bias, as the mate had been a witness against him upon his (the master's) trial at the Admiralty Sessions for piracy; and that the present case was the first in which there had been an attempt to establish a charge of mutiny on the evidence of the master.<sup>1</sup>

*Lushington and Addams*, for the mariner.

The *King's Advocate* and *Dodson*, *contra*.

#### JUDGMENT.

SIR C. ROBINSON. This is a cause of wages brought against the owners of The Malta by the mate, who had entered in the service of the ship at Liverpool in March, 1825, for a voyage to the coast of Africa and back to this country; he continued in her service till she was seized and brought to adjudication at Sierra Leone for alleged trading in slaves. On those proceedings the vessel was condemned, and that sentence is now the subject of an appeal in this [ \* 160 ] court.<sup>2</sup> The master \* has also been indicted on the same charge at the admiralty sessions at the Old Bailey, but ac- [ \* 161 ] quitted; \* and it is not necessary to say more on that point at present.

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<sup>1</sup> In a suit for wages, a log-book, not pleaded but asserted to be in the mariner's handwriting, allowed to be brought in by the owners.

On the 21st of November, 1827, the proctor for the owners brought in the log-book, which had been sent from Sierra Leone; and at the hearing, it was objected, for the mate, that, not being pleaded, it was inadmissible; and upon its being stated that the entries were in the handwriting of the mate, it was replied, that that circumstance should have been put in plea, and the parts to be relied upon pointed out, that the mate might have explained under what circumstances the entries were made. The court permitted the log to be adverted to, observing, that it would be a convenient practice if the parts of a log which were material, could be agreed upon by both parties, and extracted.

<sup>2</sup> Where the master, unknown to the owners, received persons on board as pledges and not under an absolute sale, the court, on appeal, holding such conduct did not, under the particular circumstances of the case, subject the ship to condemnation under the slave-acts, reversed the sentence of the court at Sierra Leone, but allowed the captor his expenses, costs, and insurance of the vessel.

The question, arising on the appeal from the sentence of the Vice-Admiralty Court

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\* On the effect of this seizure it is contended, that, as the [\* 162] vessel was condemned for illegal trading during the voyage,

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at Sierra Leone, condemning The Malta for a breach of the slave abolition laws, related to the real character of the alleged trading. The evidence showed, that it was the common practice of the native merchants to pledge their wives and children for the delivery of goods contracted for in barter with the trading ships; and that such pawns or pledges were, in some instances, not redeemed, but carried into slavery, as the absolute condition of such contracts, agreeably to the general practice of the natives in their dealings with each other. The court referred to passages of the evidence taken before the board of trade upon these points, and also to similar instances in the regulations of other countries where a system of slavery has existed — particularly in India, as noticed by Mr. Halhead in his work on the Gentoo laws: — “Whoever has been given up as a pledge for money lent recovers his liberty whenever the debtor discharges the debt. If the debtor neglects to pay the creditor his money, that person becomes the purchased slave of the creditor.” The court alluded also to the general principles of the law of hypothecation, as laid down in Heineccius, vol. 6, p. 410, and in Pothier, vol. 5, p. 417, respecting the transfer of the property in the thing pledged; and observed — “there seems to be no difficulty in understanding the nature of this contract. It was a sort of conditional transfer of the personal freedom of the individuals; and so long as the condition was depending undetermined, it would be agreeable to general construction to judge of the legal character of such contracts according to the alternative which might eventually become illegal.” Adverting also to the extreme jealousy with which the abolition laws have prohibited every approach to the offence of holding persons as slaves, in the intercourse of British subjects with the coast of Africa, the court remarked — “such a practice could not be consistent with the provision of the abolition acts, and it strongly behooves British subjects trading on the coast of Africa to discontinue the practice, as likely to involve them in a criminal violation of the law.” The offence alleged in this information was “the transferring the individuals so held as pawns to a Spanish slave-ship, for the purpose of being transported as slaves beyond the seas.” The court then entered on a full examination of the evidence (which was contradictory, obscure, and liable to some discredit as coming from a dissatisfied crew,) as to the time and circumstances of the principal part of the transaction, the object with which the money — \$100 — was paid by the Spanish captain, and summed up its conclusion in these words: — “Notwithstanding the deductions to be made from the credit of the master in the explanation given by him, I think the owners are entitled to the benefit of the inferences that may be drawn from it and other parts of the evidence. There is enough to show that the transfer was not that of absolute and intentional sale of these persons to the Spanish captain; the number of persons was small, being only two or three women — others having been redeemed and restored at different times. They were women belonging to the principal traders, and had come from that part of the coast to which the Spanish captain was going; and some of their relations were actually on board — who were not transferred — but went away in their own boats. The transfer to the Spanish captain arose incidentally out of a barter for other articles — and the character of it is not perfectly clear. Some evidence has been since supplied to show that these persons were actually restored to their friends; though the court may wish that fact had been more satisfactorily established. The evidence of Jackson and Pepper on the main parts of the case, the negotiation for

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and the voyage on that account interrupted, and freight not earned, the wages are not due; or in more qualified terms, that, if wages are due, they should have been recovered against the master, or against the proceeds of the vessel in the registry, since the alleged act of slave-trading was not in any manner imputable to the owners.

On the effect of this objection it will be proper that I should state what I consider to be the principles of law on this point, as it is said, in some places, that there has been no judicial decision upon it in the courts of this country.<sup>1</sup> The objection was taken, I understand, upon the admission of the summary petition; but reserved to the hearing, no authority being produced to show that the loss of freight under such circumstances would work a forfeiture of the wages; and no such authority is now adduced. If we look to general principles, as they are to be collected from the maritime codes, or the practice of other countries, I find that a distinction has been made [ \* 163 ] between those accidents by which voyages may be interrupted and the interests of mariners affected, as dependent on their successful termination, and other causes arising from the acts of the owners or masters. As to the effect of condemnation for illegal trading, in cases of common guilt there would be no room for such a distinction in favor of mariners; but, where they are in no manner im-

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payment, and the repeated and unnecessary declarations which are said to have accompanied the transfer, are such as cannot safely be relied on. Believing it to be untrue in many particulars, I feel that I should not be warranted in pressing other doubtful and unfavorable inferences to the prejudice of the owners, who were entirely ignorant of the whole transaction. I abstain, therefore, from saying more as to the legal consequences of such a transfer of slaves, as pawns, in the hands of British subjects, under the present state of the law of this country — and as to what might be the responsibility of the owners or freighters of ships, and the proprietors of cargoes, mixed up with such transactions, for acts of their agents of that kind, of a definite character and clearly proved.

“On the examination which this case has undergone before me, I do not concur in the sentence of the court below; and without impeaching the grounds on which that judgment was founded, I feel it to be my duty, on a fuller investigation of all the facts of the case, as they have appeared in this court, and also in the criminal prosecution against the master of the Admiralty Sessions at the Old Bailey, to reverse the condemnation; and I direct the captor's costs to be paid.”

The court, on a subsequent day, allowed 120*l.* for the insurance of the vessel to England by the captors, (who had delivered her to the owner,) as had been done in other instances in which the captors had not effected the insurances unnecessarily. The *Real Dugue*, (Privy Council, 1797,) and the *Narcissus* in 1801, were cited to this effect.

<sup>1</sup> Vide Jacobsen's Sea Laws, p. 153.

plicated in the illegal act, so far as I can learn, the condemnation of the vessel has not been held to work a forfeiture of their wages. I do not find that there has been any adjudged case on this point; but it has been asserted in argument and not denied, in the common-law courts, that if there has been a lading of prohibited goods on board a ship, though it subjects the vessel to a forfeiture, yet it disables not the mariner of a remedy for his wages.<sup>1</sup> This distinction is noticed as an exception to the general rule, that freight is the mother of wages;<sup>2</sup> and it may be traced much higher. It may be found in Viner's Abridgment,<sup>3</sup> and by him it is quoted from Malynes<sup>4</sup> who wrote in 1622; and there is some trace of an adjudged case in these references; and Postlethwaite, in his Dictionary, repeats the same passages almost *verbatim*, and cites, "King's Bench, Trin. Term, 7 James." But I have not been able to find any such case.

Besides these authorities, going through two centuries, and showing at least the understanding and usage of merchants, I am enabled to \*add from the notes of Sir Edward Simpson,<sup>5</sup> [\* 164] who was a person of great experience and learning in the practice of these courts, a *dictum* or opinion to the same effect. In reference to some particular case it is there said, "no wages would have been due to the mariners if the ship had been taken by the enemy or by pirates, or had been cast away, yet in the present case the mariners will be entitled to their wages to the time of the seizure of the ship; for where a ship is seized by an ally for want of proper documents, or for a prohibited trade, though no freight may be earned, the mariners not being in fault will be entitled to their wages." I find also, that the same principle prevails in other countries;<sup>6</sup> and if the condemnation of the vessel does not in itself work a forfeiture of the wages, I see no reason for considering it as a bar to the action against the owners; because as the remedy is given to the mariners for their additional security, it would be unjust to deprive them of the benefit of it merely on the ground that the owners may in the particular case be as innocent as themselves of the illegal act which has occasioned the condemnation of the ship. The court therefore cannot

<sup>1</sup> Abernethy v. Langdale, 2 Doug. p. 539.

<sup>2</sup> See The Neptune, Clark, vol. i. p. 231.

<sup>3</sup> Tit. Mariners, (A) 11, 15, (E) 6.

<sup>4</sup> Lex Mercatoria, p. 105, c. 23.

<sup>5</sup> He was Dean of the Arches and Judge of the Prerogative Court from 1758 to 1764.

<sup>6</sup> Jacobsen, p. 158.



admit the objection as exonerating the owners from their general responsibility; and I proceed to the other grounds of misconduct which have been alleged against the mate, and to the examination of the evidence by which it is supported. The evidence consists of the depositions of three witnesses, Pepper, Jackson, and Wilson, [ \* 165 ] on the \*summary petition; the depositions, of two of these persons, Pepper and Wilson, on a responsive allegation on the part of the mate; and the depositions of the master, on the allegation given in on the part of the owner; and the examination of Ellis, the master of another vessel belonging to the same owner, on an exceptive allegation, to the testimony of the adverse witnesses.

It appears that the original crew consisted of fourteen men: of whom four or five died on the coast, and no account is given of the remaining persons, on either side.

The witnesses on the summary petition speak generally to the substance of what is there stated; and bear testimony to the good conduct of the mate.

Interrogatories have been addressed to them for the purpose of impeaching their credit, and of drawing from them an admission of their own misbehavior, and of the general bad conduct of the crew: and they are contradicted in their answers by the entries of the log, which do certainly record instances of misconduct of the crew, and of some of these witnesses. It is attempted to discredit them, from these contradictions, and the court will not rely much on any thing that depends on these persons alone. Their denial, however, of any misconduct on the part of the mate, is in part confirmed by the master's own account, to which I shall presently refer. It is proper to observe, however, on the discredit so thrown on these witnesses, that it is derived chiefly from the entries on the log, which were made by the mate himself, and therefore there is no reason to suppose

[ \* 166 ] that these false representations were framed in concert \*with him; still less can it be imagined that the general misconduct of these men or of the crew, so disclosed, was considered by the mate as implicating him in any manner that would affect his wages: and it may be observed also, that the evidence of these persons is of no great importance, as it amounts to little more than the general averment of service and good conduct, which is pleaded in the petition, and may be assumed till it is disproved or contradicted by the evidence on the part of the owners, to which I will now proceed.

The allegation on their part pleads, that "soon after leaving the port of Liverpool, Walker was frequently intoxicated, and behaved in a mutinous and riotous manner; that he did not perform his duty as mate, and was disobedient to the lawful commands of the mas-

ter;" and, referring to the desertion of some of the crew on the 28th of July, charges him with having the watch at that time, and alleges, that he was well aware of such desertion, but did not take means to prevent it, or give timely information thereof to the master."

With respect to these two charges, I think the evidence of the witnesses, on the summary petition, who deny the fact, is confirmed by the master himself, who acknowledges that "until the 8th of September, 1825, he cannot say that Walker was frequently intoxicated, nor that he behaved in a mutinous or riotous manner, nor that he did not perform his duty, nor that he was disobedient to the lawful commands of the deponent." And afterwards, though he attempts to say, in opposition to what I have just read, that he was disobedient to orders, by neglecting to keep watch, and retiring to \*bed, on the night of the de- [ \* 167 ] sertyon, "he cannot take on himself to swear that he was aware of the desertion till the alarm was given." With respect to the fact whether Walker had the watch at that time, it is otherwise stated, by some of the witnesses, who say it was the boatswain's, or second mate's watch: and the entry in the log on that occasion, which is made by Walker, seems to refer to some other regular watch; the entry being, "We were alarmed by the watch on deck." The entry of the preceding day also rather negatives the supposition of any friendship or intimacy between him and Lloyd and Walker, as it is there stated, "the captain checked Lloyd's proceeding, whereon he said he would shoot the captain if he had a pistol; that he would embrace the first opportunity to put it in execution, and shoot me also, and called us pirates." This entry ranges the mate on the side of the master, and does not by any means support the further imputation of the master, "that Walker did not, on that or any other subsequent occasion, aid or assist him, as he was bound to do, in enforcing obedience; that, if he had done his duty, and stood by the master, he would have enforced obedience: as it was, from the time of the desertions he was obliged rather to humor the crew than to command."

There seems to have been no want of forcible coercion in the exercise of the master's authority, so far as we can judge from the instances recorded of putting small chains round the legs of the delinquents, and of chaining them to trees on shore, for five or six days. He suspended Pepper, and also the mate, on one occasion; and as these circumstances are all faithfully recorded, there seems

\* to have been no disposition in the mate to weaken the [ \* 168 ] lawful authority of the master.

It is impossible, however, I think, to contend against the general

declaration of the master, "that until the 8th of September," he could not say that Walker was guilty of any of the offences imputed to him; and we can only wonder how such charges, so unsupported by the only man who could have given information on the subject, could have found their way into the allegation.

The account which the master gives of the behavior of the mate on the 8th of September, on that occasion — that he was drunk and insolent, agrees with the plea, and if it is true, is certainly an instance of irregularity and misbehavior. But we are to recollect, that it is not a single instance of intemperance or indulgence, and particularly when a vessel is lying at anchor or in port, that will amount to a forfeiture of wages.

My predecessor had frequent occasion to make that remark:<sup>1</sup> and it seems to be supported by the construction of the courts of common law, since when drunkenness is mentioned as a cause of forfeiture of wages, it is habitual drunkenness which is said to produce that effect.<sup>2</sup>

The master, however, specifies three other instances on which Walker was drunk: he says, "he was drunk on the 10th of September; on the 30th, off Cape Lopez; and in November, off the Muskito shore."

There are no aggravating circumstances stated with [ \*169 ] respect to these instances, and it is to be observed \* that they are not specified in the allegation. The witnesses, in denying that they saw Walker drunk, distinguish "between such drunkenness as disabled him from doing his duty;" and the evidence of Capt. Ellis on the exceptive allegation seems to point to some such distinction.

It has been pleaded, "that the mate was drunk on that and other occasions;" to which Capt. Ellis says, "that, on several of the occasions of his being on board The Malta, while lying off Lamma, and off Cape Lopez, comprising the time from the 6th of September to the 27th, when The Morning Star sailed for England, he perceived Walker to be the worse for liquor, but not actually drunk; he was elevated by liquor, so as to appear to have lost all respect for his superior officer. He conducted himself in a manner very little short of actual insubordination; but he cannot recollect any positive act which passed in his presence; Walker's conduct was that of a man who, under the influence of liquor, did not care for any thing."

<sup>1</sup> See 2 Robinson, 261. The New Phoenix, vol. i. 199; Lady Campbell, *supra*, p. 5; Ealing Grove, ib. 15.

<sup>2</sup> Abbott on Shipping, 5th ed. p. 472.

This is the worst which Capt. Ellis can say of him, and when it is remembered that he was in constant communication with the master from the 7th to the 27th of September, a period of time which comprehends two of the four instances of intoxication specified by the master, the tenor of his evidence does not, I think, imply that Walker's conduct had been the subject of complaint or observation between them. It is to be observed also that there was a daily intercourse; there was a transferring of redwood and other articles of the cargo between the two ships, during that time, in which the mate must have been principally employed; and the manner in which the entries in the log are made, \*and the whole keeping of the log, does not appear to me to be the work of an habitual drunkard, nor of a man careless or neglectful of the duty of the ship. I think, therefore, that the charge of drunkenness, in the sense that would be necessary to support this charge and work a forfeiture of wages, completely fails. With regard to the charge of mutinous or disobedient behavior, the testimony of the master, on this point also, absolves the mate from all blame up to the 8th of September. The instance, chiefly relied upon after that time, is, the fray that happened on the night of the 25th of October. It is not very easy to understand in what manner that quarrel arose, nor whether the different accounts refer to the same transaction; but if I take the master's own statement, it by no means supports the plea, "that Walker struck the master and knocked him down, when he and others of the crew dragged him to the gangway, knocked his head against the gunwale, and kicked him on the face, and thereby stunned him and confined him to his cabin all night without assistance."

Now, on the master's own statement, the mate appears to have first attacked the men, who had improperly intruded themselves into the master's cabin; and it is not till after the master had interfered in a fray between the mate and one of the men, in support of the master's authority, and had collared the mate, that any blow is struck by him. The violent blow which is spoken of was struck by some one behind. The knocking of the master's head against the gunwale, which is charged against Walker, is not spoken to: it was altogether a scene of confusion, arising out of the festivities encouraged by the master, or else from accidental \*misunderstanding. It is impossible to consider the scuffle so produced, even as described by the master, as sufficient to support the charge of mutiny.

It is to be observed also, that although the entries in the log of the 27th and 28th of October, which seem to relate to this occurrence,

show that there had been some exercise of authority on the part of the master, by which the mate had been suspended, yet there had been a subsequent restoration of the mate to the duties of his station. It will be unnecessary in this case to decide how such a forgiveness might affect a forfeiture of wages, actually incurred under other circumstances. But I think I may safely say there are no relations of duty, in which it is more expedient to encourage a spirit of forgiveness and reconciliation for occasional offences, than in the quarrels between such persons; and that policy appears to have been fully recognized in all the ancient maritime codes.

The next charge relates to the offence of trading at Prince's Island, with the ship's cargo, without paying any duties. The manner, however, in which this was done, implies that the mate and the steward, Pepper, who is involved in the charge, conceived they were acting agreeably to the intentions of the master, — for, according to the master's own deposition, they accounted to him for the money; and the tone in which he says, he reprov'd them for it, in desiring it might not be done again, shows that he considered it only as an imprudent act, and not as any serious misconduct. The charge of pur-

loining thirty-three pieces of cloth is obscurely stated, and it [ \* 172 ] is not proved in any \* manner, particularly against the mate.

The act of embezzling is treated as a cause for withholding a proportionate part of the wages of mariners;<sup>1</sup> but I do not know that it is considered as a cause of entire forfeiture of wages otherwise earned.

The fifth article pleads the part which the mariners are supposed to have acted, in giving the information on which the vessel was seized and condemned. I do not perceive, that this act is proved in any manner to have been done by the mate; but if it had, unless it could be shown to have been a false and malicious act, I do not see on what principle it can be considered as a cause of forfeiture of wages. That the information was false in fact is not proved by the verdict of acquittal; on the contrary the master, in his defence, admitted the transfer of the women to the master \* of a Spanish slaving vessel, and there was evidence of money passing between them. He rested his defence only on his explanation of that act, that the Spanish master had agreed to put them on shore, in their own country, about a hundred miles further on the coast; and that he was empowered to receive the money for which they had been held in pledge. I will not say more of this transaction at present, than that it was highly impru-

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<sup>1</sup> See Abbott on Shipping, 5th ed. p. 472.

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The Shannon. 2 Hagg.

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dent and culpable; and that it was very fit to be made the subject of inquiry before the tribunals of the country, under the strong terms in which every act contributing towards trading in slaves, or holding persons in slavery on the coast of Africa, is reprobated and prohibited by the abolition acts.

I must observe further, that the 51 Geo. III. c. 23, s. 9, \* which is embodied in the Slave Consolidation Act, encourages information to be given by petty officers and mariners of any act of slave-trading committed by the master; and on the assurance that they shall be exempted from the penalties so incurred under that statute. It would not be consistent with the policy of that statute, nor with the general principles of law, to hold that the forfeiture of any legal interest should be incurred by the mariners, acting in the enforcement of the penalties of the law, although the owners might be affected thereby; on this view of the case, I do not feel myself warranted to pronounce that any act of misconduct has been alleged and proved on the part of the owners, that will absolve them from the demand of wages which is the subject of this suit, and I pronounce accordingly for the payment.

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SHANNON, Pennefather.

April 29, 1828.

In a cause of collision against a steam-vessel, the court, assisted by Trinity Masters, pronounced for damages and costs; holding that the steam-vessel, being more under command, and manifestly having seen the other vessel, was to blame.<sup>1</sup>

An action was entered in 400*l.* against a steam-vessel, The Shannon, for damage to The British Union, off Beachy Head. From the affidavits it appeared that The British Union was going up and The Shannon down the Channel; that The Shannon had seen The Union five miles off, but that The Union did not see the steam-vessel till just before the collision.

*The King's Advocate* and *Haggard*, for The Shannon. The Shannon was on the starboard \* tack; and the rule of [\* 174] navigation is, that when ships are crossing each other in

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<sup>1</sup> [The Leopard, Daveis's R. 193; The Perth, 3 Hagg Ad. R. 173.]

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opposite directions, and there is the least doubt of their going clear, the ship on the starboard tack is to persevere in her course ; while that on the larboard is to bear up, or keep more away from the wind ; that in this latter situation was The British Union, and if she had followed the rule of navigation the accident would not have happened. The affidavits showed that the crew of The Shannon believed that The British Union would bear up.

*Lushington and Nicholl, contra.*

The advantages which belong to steam-boats distinguish this from an ordinary case of collision ; that even admitting the general rule of navigation to be correctly stated, it would not justify a vessel, having the power to avoid a collision, in standing upon any such privilege if she foresaw the disastrous consequences of persisting in such a course. Here it was proved that The Shannon perceived The British Union at a distance of several miles ; but, independent of this circumstance, steam-boats, it was well known, always went to the larboard.

Court. If the state of facts were clear and undisputed, the court would be disposed to concur in the argument, that the rule of navigation should be applied according to the characters of the two vessels ; but here the testimony is conflicting, and the defence of The Shannon partly is, that she actually supposed The British Union intended to bear up.

The *Trinity Master* observed — whether the wind was N. W. as represented by The Shannon, or N. N. E. is of no very great [ \* 175 ] importance, as The \* Shannon, not receiving her impetus from sails but from steam, should have been under command. Steam-boats, from their greater power, ought always to give way ; upon this consideration, and also being satisfied that The Shannon had seen The Union, they were of opinion The Shannon was to blame.

The court accordingly pronounced for damages and costs.

## CONCEPTION, Eruzuma.

May 6, 1828.

A sale of derelict having been previously allowed, and the proceeds brought in, the court signed the *primum decretum*, and at the same time permitted the proceeds, which were far less than the disbursements, to be paid by the salvors.

HAGGARD moved for a *primum decretum*. This was a derelict brought into the River Mersey by the brig Magdelaine, on the 1st of August, 1827. On an affidavit of the owner of the brig, founded upon the report of surveyors at Liverpool, as to the state of the derelict, a decree of appraisement and sale had been suffered to issue before the usual defaults had taken place, and consequently before the *primum decretum* was signed.

The proceeds, 132*l.* 4*s.* had been brought into the registry; but the disbursements exceeded 66*l.*

On this day, upon the proctor for the admiralty not offering any opposition, the court signed the *primum decretum*; and, under the circumstances of the case, permitted the proceeds, upon the usual security, to be paid out of the registry for the use of the salvors, without a further special application to the court.

Motion granted.

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\* GENERAL PALMER, Truscott.

[ \* 176 ]

May 13, 1828.

The court, assisted by Trinity Masters, held, that if towing is necessary, pilots are bound to perform it, having a claim for compensation for damage to their boats, or for extra labor; they are bound to offer their services in all weathers, and their claims for extra compensation are *stricti juris*. A tender of 50*l.* held sufficient, and the pilot's costs refused.

THIS East Indiaman, bound for Madras, had sailed from Portsmouth on the 12th of January last, and on the morning of the 13th a violent gust of wind, off Portland, carried away her masts. A jury-mast was rigged, under which she directed her course back to Portsmouth, and had reached Dunnose, when a pilot was taken on board. No signal of distress was flying. The pilot recommended that his boat should be employed to tow, and threatened to leave the vessel, if this recommendation was not complied with. Captain Truscott refused, and told the pilot to leave the ship at his peril. Subsequently,



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The General Palmer. 2 Hagg.

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the pilot-boat (which had quitted the ship) was recalled, and was occupied for three hours in towing the vessel into St. Helen's Roads. The boat sustained some little damage; and Captain Truscott tendered at first 20*l.* to the pilot for his services, which was rejected; and this suit was instituted against the ship, her tackle, and cargo, and also against the owners and master thereof; and in March a tender of 50*l.* was also rejected.

The value of the ship and cargo was estimated at 25,000*l.*, and bail was given to the amount of 2,000*l.*

The court was assisted by two of the elder brethren of the Trinity House.

*Phillimore and Addams*, for the salvors.

*Lushington and Dodson*, *contra*.

[ \* 177 ]      \* JUDGMENT.

SIR C. ROBINSON. The court is very glad that the attendance of Trinity Masters has been requested; not because the case involves any nice question of nautical skill, but as it gives the court an opportunity of expressing some general observations on this class of cases in the presence of members of the Trinity House, who have a control vested in them over pilots, and in some respects a jurisdiction in cases of extortion or misbehavior that might be exercised on the same facts, that might be set up as grounds of merit in this court, constituting, therefore, under certain circumstances, a kind of concurrent jurisdiction.

This case originated in pilot service, as the men plied in that capacity, and were so employed. When the pilots were told that if they left the ship it would be at their peril, they protested against any such intention, apparently under an anxiety to justify themselves in the discharge of their duties as pilots. The case comes, therefore, under the general provisions of the acts which have been passed for the regulation of that service,<sup>1</sup> unless the circumstances distinguish it from general pilot service. This, indeed, is contended on behalf of the salvors, and is also admitted in a slight degree on the part of the owners, by the tender of 50*l.* The court is impressed most strongly with a desire to put an accurate construction on this general question, from having had occasion to notice, during the last three months, other instances in which pilots on the coast have advanced unrea-

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<sup>1</sup> See 6 Geo. IV. c. 125.

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sonable claims of \*salvage.<sup>1</sup> Of the present case, you, [\*178] gentlemen, will judge, on the evidence and the arguments which you have heard. Considering the nature of the service and the provisions of the pilot acts, which have fixed a rate of remuneration on a liberal scale, with a power in the Trinity House to make alterations, and with a liberty of appeal on the part of the majority of pilots, if the rates should appear to them to be insufficient, — considering that pilots have an exclusive privilege of service, that they are \*expected in return to be always ready, and ] \*179 ] that they are under an obligation to afford their assistance, unless under circumstances of absolute danger to their lives, it is of great public importance that these acts should be faithfully interpreted, both by the pilots themselves and by this court, on any estimate that it may be required to take of claims of salvage growing out of such services. I repeat, therefore, that the court is glad in being assisted by the judgment of members of the Trinity House on these questions: — Whether the state of the wind and of the tide

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<sup>1</sup> March 12, 1828.

In extraordinary pilot service, additional pilotage is the proper rate of reward.

In the *Enterprise*, Crosbie, in which a pilot-boat had been employed by a steam-vessel, (that had lost her rudder,) to steer or tow her into Plymouth, about thirty-five miles, the court adverted to the obligation of pilots under the 6 Geo. IV. c. 125, and to the general principles of the maritime law, of allowing for extraordinary pilot services in cases where a vessel in distress might be compelled to seek a port, and held, that additional pilotage would be the proper rate of reward for such mere pilot services. And, advertent to the ordinary rates of pilotage at Plymouth, namely, about a guinea for every league, the court gave the sum of 20*l.*, being double the rate of common pilotage, and *15*l.* nomine expensarum*.

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Persons assuming the characters and duties of pilots are only to be remunerated according to the rates of that service, and not as salvors.

AND in *The Columbus*, Nerroll, (13th June, 1828,) in which a Bridlington fishing-boat had gone out of harbor, on a signal for a pilot, to the distance of about thirteen miles, and had helped to steer the vessel (an empty trader from London) into that port, the court held the tender of 1*l.* 10*s.* sufficient; and, referring to the case of *The Michael*, 31st July, 1805, in which Lord Stowell had refused to consider fishermen (taken on board in the Channel as pilots) entitled to be rewarded as salvors, observing "that they were engaged as pilots, and if they assumed that character they ought to adopt the rules, and be remunerated according to the rates of that service," the court reprobated the practice of instituting claims for salvage in such cases, at an expense far beyond the value of the services, and refused to grant any further reward, and declared it to be its duty to be very strict in holding cases of this description to their proper character.

made it impossible that the vessel should have been brought into St. Helen's without towing; whether the assistance of towing was such an addition to the services, ordinarily required from pilots, as to constitute a salvage service; whether the towing in this case occasioned a material damage to the pilot-boat; and whether the general circumstances are such as found a case of extraordinary danger or labor, and thereby justify a claim for salvage remuneration.

The *Trinity Masters* said their opinion was that the vessel might have reached St. Helen's without assistance from the pilot-boat; and that if towing was necessary, pilots were bound to perform it, having a claim of compensation for any damage to their boats, and for extra labor; that pilots were bound to offer their services in all weathers; and that the facts of this case did not establish a claim for remuneration beyond the tender.

COURT. The court entirely concurs in this opinion, and is deeply sensible of the necessity of holding strict the construction to be put on this class of cases. It therefore pronounces the tender [ \* 180 ] \* to be ample, and reserves the question of costs till they shall have been taxed, and it may be informed what expenses have been incurred by the rejection of the tender.

In future cases, I shall neither hold the court nor the owners bound in any manner by a tender not accepted in due time, being fully aware of the advantage which has been taken by salvors of the rule as to tenders,<sup>1</sup> in speculating upon the chance of not suffering a diminution by costs, owing to the liberality which the court has applied to salvage cases.<sup>2</sup>

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On the 10th of June, the court rejected the application for costs on the part of the salvors, but declined to condemn them in costs, as it was stated that the tender had been refused by advice of counsel.

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<sup>1</sup> See *Vrow Margaretha*, 4 Rob. 106; and vol. i. p. 156.

<sup>2</sup> In *The Albion*, Burrell, (July 16, 1828,) where a tender of 2*l.*, accepted by twenty-nine co-salvors for towing *The Albion* (on fire about eight miles from Hastings) into port, was confirmed, the court expressed its disapprobation at the suit, remarking also upon the action having been entered at 300*l.*, and condemned the salvor who had instituted it in 5*l.* costs.

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The Fruit Preserver. 2 Hagg.

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\* FRUIT PRESERVER, Brown.

[\* 181]

July 5, 1828.

The Court of Admiralty does not interfere in cases of adverse title, nor does 6 Geo. IV. c. 110, extend its jurisdiction, or make ships more absolutely transferable under a conditional bill of sale for the purpose of security, than before.

A warrant of arrest refused for the purpose of transferring the possession to the holders of such a bill of sale.

LUSHINGTON moved for a warrant of arrest, for the purpose of transferring the possession of this ship to the mortgagee or purchaser under a conditional transfer, to secure a debt of 400*l.* under a deed dated July, 1825. The deed recited that, on default of payment in 1827, the interest should become absolute in the purchaser to secure the amount of the money lent; and in the meantime that the vendor (the master) should continue in possession. The 6 Geo. IV. c. 110, s. 45, seemed, he submitted, to confirm such a title, and to take the case out of the former practice and decisions of the court. The Court of Chancery could not give the mortgagee possession, and the owner being a bankrupt, it was of no use to sue him personally.

It was stated on affidavit that Brown, the owner and master, was about to sail from Liverpool; and that unless the court would grant this application, there was no other mode of enforcing a sale.

COURT. The court, advertng to The Guardian, Beaton,<sup>1</sup> The Aurora, Thompson,<sup>2</sup> and The Sisters,<sup>3</sup> Tubbs, observed:— This is substantially a case of adverse title, in which this court in modern times has declined to interfere.<sup>4</sup> The circumstances are strong, the debt small, the possession \* continuous; the default of pay- [\* 182 ] ment occurred in 1827, and no proceedings were instituted till 1828. In such a case, the court thinks itself bound to decline to interfere. The 6 Geo. IV. does not increase the jurisdiction of the court, or make ships more absolutely transferable, in this form of conditional bill of sale for purposes of security, than they were before. It is, on the contrary, intended to set at rest doubts that have been entertained on the effect of such bills of sale, and enacts that mortgagees shall not be deemed owners, “except so far as may be necessary in order to render the ship or vessel, share or shares so transferred, available by sale or otherwise for the payment of the debt or debts

<sup>1</sup> 3 Rob. 94.<sup>2</sup> *Ib.* 135.<sup>3</sup> *Ib.* 214; 5 Rob. 155.<sup>4</sup> See *Warrior*, Peach, 2 Dod. 288; *The Pitt*, Crosse, vol. i. 240.

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The Christiana. 2 Hagg.

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for the securing the payment of which such transfer shall be made.”<sup>1</sup> According to my apprehension, a mortgagee is not an owner under this section, except for security. It is said there is no other mode of enforcing a sale than under the process of this court; but the matter not being properly within the jurisdiction of this court, it will only lead the owners into further difficulties and expense to assume a power which cannot be sustained. I must reject this application.<sup>2</sup>

[ \* 183 ]

\* CHRISTIANA, Larsen.

July 16, 1828.

Under statute 1 & 2 Geo. IV. c. 75, the Court of Admiralty is authorized not only to arrest a foreign ship, but to proceed to judgment in a case of collision. Protest of foreign owner overruled. But a duly qualified pilot being intrusted with the navigation of the vessel, the owner is exonerated, under stat. 6 Geo. IV. c. 125, s. 55, which applies equally to foreign as to British ships.<sup>3</sup> Foreign owner and bail dismissed.

THIS was a cause of collision. The action was entered against The Christiana, a foreign ship and her freight, and the warrant of arrest had issued in the usual manner. An appearance was given, under protest, for the foreign owner of the ship, alleging, that The Christiana was bound to Norway, and when the collision took place was off Broadness Point in the River Thames, and without the jurisdiction of this court. That Cole, a duly licensed pilot, was on board, and had the full charge of the ship. That the exception in the 6 Geo. IV. c. 125, s. 2, was inapplicable to this case; and, after alleging that by the 58th section of the same statute a penalty was imposed on the master of any ship who shall act himself as pilot, or who shall employ as a pilot any unlicensed person, it referred to the 55th section; and submitted, that by reason of the premises, and of the said statute, the owner of The Christiana was not liable for the amount of damage sustained by the barge.

On the part of the owners of the barge, it was alleged that the owner of The Christiana was amenable to the jurisdiction of this court under the 1 & 2 Geo. IV. c. 75, s. 32, which declares, “ That in every case in which any damage shall be done by any foreign ship or

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<sup>1</sup> 6 Geo. IV. c. 110, s. 45.

<sup>2</sup> See *The Portsea*, Lamb, *supra*, 84.

<sup>3</sup> [The Protector, 1 W. Rob. 45.]

vessel to any British ship or vessel, barge, boat, or other craft, or any buoy or beacon in any harbor, port, river, or creek, and it shall appear on a summary application made to any judge of any of his Majesty's courts of record at Westminster, or to the \* Judge [ \*184 ] of the High Court of Admiralty respectively, that such damage or loss has probably been sustained or arisen by the misconduct or negligence of the master or mariners of such foreign ship or vessel, then and in such case it shall be lawful for such judge to cause such foreign ship or vessel, being in any harbor, port, river, or creek, to be arrested and detained until the master or owner or consignee of such ship or vessel shall undertake to appear and be defendant in any action which shall be brought for such loss or damage, and give sufficient security by bail, or otherwise, for all costs and damages if recovered as shall be directed and ordered by such judge, if it shall, upon the trial of such action or suit, appear that such loss or damage shall have arisen from such negligence or misconduct as aforesaid, and in such action or suit, the person giving security shall be made defendant, and shall be stated to be the owner of the foreign ship or vessel doing such damage, and it shall not be necessary in any such action or suit to give any other evidence of the liability of such person to such action or suit than the production of the order of the judge made in relation to such security."

The *King's Advocate* and *Chapman* in support of the protest. It is alleged that the case is within the exception in the Pilot Act, 1 & 2 Geo. IV. c. 75, s. 32. But this section does not give the Court of Admiralty full jurisdiction; it only empowers the court, upon a summary application, to arrest a foreign ship for security, and prevent her departure till bail be given, in order to enable the courts of Westminster Hall to proceed to a decision upon the case: but bail gives no jurisdiction, and the statute leaves, in this instance, the general \* jurisdiction as it stood before, liable to exception [ \*185 ] from the local position of the vessel. Another objection is, that the warrant issued in the ordinary form; whereas, under this section, it should follow a previous affidavit and application. A duly qualified pilot, however, being on board, exonerates the owner. By 6 Geo. IV. c. 125, s. 55, it is enacted, "that no owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whomsoever from or by reason or means of any neglect, default, incompetency, or incapacity of any licensed pilot acting in the charge of any such ship or vessel under or in pursuance of any of the provisions of this act, when and so long as such pilot shall be duly qualified to have the charge of such

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The Christiana. 2 Hagg.

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ship or vessel." Here the vessel was in charge of a fit and competent pilot. *Bennet v. Moita*, 7 Taunton, 258.

*Lushington and Addams, contra.* The 1 & 2 Geo. IV. c. 75, s. 32, not merely enables the court to take bail, so that the injured party may proceed at common law, but enables this court to administer a full remedy; and any other construction would introduce a singular anomaly for which no precedent has been cited. The words, "costs and damages, if recovered, as shall be directed and ordered by such judge," must apply directly to the judge who issues the warrant. It never could have been intended that an action should be entered against an individual at common law upon bail given in this court. If warrants in these cases may not be extracted in the ordinary form the object of them may be defeated; for if the Judge should be absent how could an application be made to him? Any [ \*186 ] \* order of this nature would suspend, at least, the issuing of the warrant. And the question, whether any or what damage, must be for ultimate consideration.

That a pilot was on board is no cause of protest; for if the damage should proceed from the acts of the master and crew they would not be exonerated from liability: the statute, however, does not apply to foreign ships. In *The Carl Johan*,<sup>1</sup> Lord Stowell decided that the 53 Geo. III. c. 159, in which words, precisely similar to the 6 Geo. IV. c. 125, s. 55, were brought under his consideration, did not apply to foreign vessels. From analogy, therefore, it is to be inferred that it is not compulsory on a foreign ship to attend to the regulations of the Pilot Act, and to have a duly qualified pilot on board.

#### JUDGMENT.

SIR C. ROBINSON. I should not have been surprised to have found a distinction as to foreign ships, existing on general principles, though I do not know of any formal authority to that effect. The question for my consideration is, whether the jurisdiction given by the 1 & 2 Geo. IV. c. 75, s. 32, is full and entire for the purpose of enabling this court to give judgment on such cases, or whether it is only ministerial for the purpose of arrest and detention, and as adminicular to the institution of proceedings for redress in the courts of common law. This restricted interpretation is not the natural one on a subject of so much nicety and importance as the jurisdiction of a

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<sup>1</sup> Cited in *The Dundee*, Holmes, vol. i. p. 113.

court of justice; nor would it be convenient for the purposes of \*justice. The terms of the statute are general: the [\*187] thirty-first section deals with the general jurisdiction of the court; and declares, that there shall be a concurrent jurisdiction between the Courts of Westminster and the High Court of Admiralty in cases of salvage rendered between high and low water-mark. The clause then adverts to the case of foreign ships, and directs "that they may be arrested by the Judge of the High Court of Admiralty."

This power is given in terms of general reference, and without any restriction. As to the limitation suggested, it does not appear in what way the process of the common-law courts would be engrafted on an arrest of a vessel by a warrant of this court; and where bail would be taken under its authority. It is my duty to put the broadest construction on the jurisdiction assigned to this court for the purpose of administering effective justice in the cases there provided for; and I shall not be disposed to do otherwise, till I am instructed by a superior court as to the limitation so said to be imposed upon its jurisdiction by the statute. It has been argued, also, that the statute requires the application to be made to the court on special motion; whereas the warrant in this instance was taken out in common form. It may, perhaps, be more proper that the court should be applied to on the subject; but as this warrant has been served, the court will not now supersede it, nor decline to act upon it.

On the point of exemption by reason of a pilot being on board, I think that is not strictly a matter of protest; and, indeed, this form has been admitted to have been adopted on the ground of convenience: the terms of that statute (6 Geo. IV. c. 125, s. 55,) \*relate only to damage done by the neglect or incompetence [\*188] of the pilot. It will not appear whether the injury alleged to have been done in this case is of that nature, till an opportunity is given to the other party of replying to that averment. Such a distinction was suggested in the case of *Bennet v. Moita*,<sup>1</sup> though not as a cause of protest; and such a defence properly introduced might avail under the authority of that case; for I should be disposed to act on the same principle, if no facts should be alleged on the other side to take off the general presumption that the pilot, being the person intrusted with the navigation of the ship, was the person to whom the injury arising from collision should *prima facie* be attributed. That was the reasoning of the Court of Common Pleas in the case referred to, and applied to a foreign ship, on the construction

<sup>1</sup> 7 Taunton, 258; *Ritchie v. Bowsfield*, ib. 309.



of the 52 Geo. III. c. 39, the basis of the 6 Geo. IV. c. 125, the statute now under consideration.

Another argument is, that the statute does not apply to foreign ships; a construction drawn from what passed in the case of *The Carl Johan*;<sup>1</sup> but the Court of Admiralty has always treated this statute as obligatory on foreign ships as well as on our own. And without referring to general principles, it is manifest that, from an absence of local knowledge, no ships can be more in want of pilots in the Thames than foreign ships. There are also several sections in the present statute that relate to foreign ships; and it would be disadvantageous to them if the general obligations of pilots, [ \* 189 ] under the act, \* should be held not applicable to foreign vessels. There does not appear to be any solid ground for such a limitation. I therefore overrule the protest, and feel it my duty to intimate, that unless it can be shown that the cause of action arose in a manner not imputable to the pilot, the court will admit the defence on the principle before adverted to, and will not proceed further in this case.

*Note.* It was admitted that no such distinction could be suggested, and the court dismissed the foreign owner and the bail.

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VESTA, Thompson.

July 18, 1828.

If the award of magistrates is generally a reasonable reward for salvage services, the court will not disturb it in a trifling sum, merely because the apportionment should be in some degree objectionable, it being the duty of the court to support such awards, as far as they are not excessive, nor inconsistent with general principles. An award of two fifths of the whole proceeds sustained; but the court, objecting to a different rate of salvage for the ship and different parts of the cargo, as unusual and inconvenient, refused to allow the salvors' costs.

This ship, on a voyage from Memel to London, stranded on the Gunfleet Sand on the 18th of November, 1827, and was not got off till the 16th of December. The salvage was effected by five boats and twenty-two men, employed during the whole of that period. The award of the magistrates at Colchester had allotted two thirds

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<sup>1</sup> Cited in vol. i. p. 113.

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The *Vesta*. 2 Hagg.

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of the value of the ship — one fourth of the deals forming part of the cargo, and one third of the corn on board, giving altogether two fifths of the whole proceeds — about 1,000*l*.

*Lushington* and *Addams*, for the owner. We object to the award on two grounds : — 1st, That the amount of the whole sum given for salvage is too \*great a proportion. 2d, That an [\*190] apportionment has been made on a principle novel and inconvenient in practice, and likely to lead to unfair preferences. The allotment should be equal upon the ship and upon the cargo.

The *King's Advocate* and *Nicholl*, *contra*. The whole sum allotted for salvage is not excessive in reference to the number of men, and the length of the service, which was attended with great labor and hazard, and not without considerable privations, as the men were often ten hours without provisions or shelter. In *The Jonge Bastian*, 5 Rob. 322, two thirds were given. The apportionment was made on account of the greater danger and length of time attending the salvage of the ship than of the cargo, as the principal part of the cargo consisted of deals, which were buoyant, and could not easily be lost. It was then fair and equitable that the brig should bear a larger proportion of salvage than the cargo.

#### JUDGMENT.

SIR C. ROBINSON. I have thought it necessary to examine the evidence minutely, in order to satisfy myself on the merits of the case, and the reasonableness of the general award ; because, if that should appear to be justified by the circumstances of the case, the sum being trifling, the court would not be disposed to disturb the decree on a small point that might be objectionable in the apportionment.

It occurred to me that the number of boats was larger than could be advantageously employed during so long a period ; and it was rather a matter of surprise to me to find that means were not used \*to tranship the corn, as it appeared to be a [\*191] strong measure in salvors of this description to throw over-board the most valuable part of the cargo, above 900 quarters of grain. The court is, however, perfectly satisfied on these points. When the master and crew went away, they left the vessel under the care of Mr. Nixon and Mr. Billingsley, of Harwich, the agents of the consignees or insurers, and, as the court may suppose, of the owners of the ship. This would be the most natural and favorable presumption. A daily communication appears to have passed between the salvors and the agents ; and, since no objection has been taken by

them, it is to be presumed that every thing was rightly done, and to the best advantage. The same presumption applies to the throwing of the corn overboard for the purpose of lightening the vessel. The first quantity was thrown overboard before the departure of the master; and the measure appears to have been sanctioned by his authority, or by that of his agents. The case, therefore, is liable to no objection on that ground.

The services were performed with considerable labor and exertion, with great privations to the individuals, and with occasional risk. There was also a loss of the general occupation of the boats and men during the best part of the fishing season, which is called the stobart season. The award does not afford more than 3*l.* 10*s.* for each boat per day, and not more than 13*s.* 8*d.* for each man, and it appears that 6*s.* were paid to an occasional assistant. This alone induces me to think the award, though large and liberal, is not excessive. The value of the property was but small; the salvage, therefore, may [\* 192] be greater in proportion to the value \*than in large cases, without deviating from the rule and practice of the court on that point.

In cases of this description, coming from the award of commissioners appointed by act of parliament to allot salvage on the spot, in order to save the time and expense of a regular suit, it is my duty to support the awards so far as they may be not inconsistent with the general principles of this court, or chargeable with excess on comparison with the principles applied to cases of a similar kind in this court. In this instance, the allotment is not beyond what this court has been in the habit of giving. A case has been cited in which two thirds were given; and in the case of *The Courier*, decided in July, 1813, under circumstances very similar to the present, a moiety was distributed under some settlement or arbitration, though the court was inclined to think two fifths would have been an adequate remuneration. That ship was stranded about fifteen miles from the Harwich coast, and was finally deserted and went to pieces. The cargo, of the value 9,000*l.* for exportation, was saved by eighteen boats from Harwich, and by the exertions of their respective crews, altogether amounting to 116 men. Some agreement was made between the owners, their agents, and some of the salvors, by which a moiety was given. "In my own judgment," said the court, "I should not have decreed more than two fifths; but as one half has been given by agreement to one party, I shall not disturb it as to the salvors, and accordingly grant the same proportion."

In that case, then, there was an expressed opinion of this court that two fifths might be given in cases of high merit. That is the

the general rate for \*derelict; and if that case bordered on [ \*193 ] derelict, so does the present; and as the value in this case is less, I think it is a precedent on which the court may safely pronounce that the award now under consideration is not excessive. On the other point, I have not the same satisfaction in confirming what has been done by the commissioners. They have made separate allotments on the ship and on the cargo; on the ship, valued only at 366*l.*, they have given 245*l.*, or two thirds; while on the deals, amounting to 600*l.*, they have given one fourth, or 150*l.* No explanation has been furnished as to this distinction.

It is said that it might be made with reference to the difference of danger to which the property was exposed; but that would be a difficult criterion to be applied in most cases. The buoyancy of articles may vary in different places—in the sea or in the river; and on the high seas, the consequence may not be very different to the owner whether the articles sink or float away. It might be adopted on a computation of the difference of labor employed in the constant attempts to float the ship, which were ineffectual for so long a time, and the comparative facility of floating the deals; but I do not think that would be a safe criterion in general cases. Suppose, for instance, a casket of jewels on board, and which might be saved with great facility; it could not in such a case be contended that the salvors would only be entitled to a small gratuity for carrying it on shore. To uphold such a notion would lead to preferences in saving one part of a cargo before another. The more usual rule has been to make \*a valuation on the ship and cargo, and I think [ \*194 ] that would be the more convenient practice.

It is possible that the commissioners may have been guided by some distinctions that may prevail in some other cases; but if there is such a rule, it cannot, I think, be safely applied to salvage cases, either by the commissioners, or by this court. If the question, therefore, related to a sum of considerable magnitude, I should either have required further information, or have taken more time to consider this part of the award before I could have confirmed it with satisfaction to myself.

The principle of giving specific proportions of the property saved is an inconvenient rule in itself, and must lead to error, unless checked by proper attention to the adequacy of the remuneration so assigned, according to the circumstances of the particular case. In this instance it has prevented the court from apportioning accurately the sum which it might think sufficient and proper to be given. It cannot now open the whole case so as to raise the salvage on the cargo from one fourth, which would be below the general rate. It

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The Brothers. 2 Hagg.

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would therefore be prejudicial to the salvors to reduce the allotment on the ship; and if the court were to reduce it to any intermediate proportion, the disparity would still remain as to the deals. I will not, therefore, under the particular circumstances of this case, disturb the sentence on this point. But I do not approve the distinction; and as I do not confirm the sentence in principle, I cannot decree costs.

[ \* 195 ]

\* BROTHERS, Stewart.

July 18, 1828.

In an appeal from a magistrate's award in a case of salvage, their certificate of value under stat. 1 & 2 Geo. IV. c. 75, s. 9, even if not conclusive, is of great weight; and the court, dissenting on no point from the award of one third of the proceeds, affirmed it with costs.

THIS was a case similar to *The Vesta*. The ship had struck on the same sand on the same night: the services were of the same kind, and continued for fourteen days. The ship was not got off. The value of the goods saved was 9,680*l.*; and the sum awarded was 3,050*l.*, and 175*l.* to *The Oyster*, a separate boat. There were fifteen boats and sixty-seven men.

The *King's Advocate* and *Nicholl* for the owners.

The salvors have very considerable merit, but the estimate of their services by the magistrates cannot be sustained. No effective measures were taken to preserve the cargo before the morning of November 21st. Up to that period only six smacks had been employed; the weather had then much moderated, and after the 22d the exertions of the salvors were not in the least impeded. The award is excessive; it amounts to a full third of the cargo saved, inclusive of the duty upon the tallow, the duties upon which the commissioners neither directed to be deducted, nor the tallow to be sold duty free. The salvage also given to the three men of *The Oyster*, who were only employed seven days, is greater in proportion than the remuneration to the other boatmen. Besides the award being excessive, it was made on a partial examination of the goods, and an erroneous estimate of the value. The original valuation by the tradesmen on the spot was 9,680*l.* 9*s.* 6*d.*; while the affidavits place it at 7,000*l.* It

[ \* 196 ] will, however, \* be contended that the value certified by the magistrates is the only value on which the court can pro-

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The Brothers. 2 Hagg.

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ceed. The 1 & 2 Geo. IV. c. 75, s. 9, directs that the certificate shall be received as evidence, but not as conclusive evidence of value; and the court of appeal is not bound by an erroneous valuation. Here the difference is more than 2,000*l*. The award at Harwich proceeded on an estimate of the bristles, from two samples out of thirteen; of the hides from weight, which had been much increased by water; and of the tallow, with the duties included.

*Lushington and Salusbury, contra.*

The owners, in this case, are precluded from reviewing the estimate on which the salvage has been allotted. The mode of valuation is fair; it was ascertained by evidence before the magistrates, and assented to by all parties: if it had been improperly made, the agents of the consignees of the cargo should have interfered upon the spot; or, upon the appeal, have resorted to a commission of appraisement.<sup>1</sup> How is the court to ascertain the true value of articles of which it can have no knowledge nor experience; and especially when the owners have taken the property into their own possession?

The statute makes the certificate of the magistrates, upon this point, final. If not, why is it directed to be transmitted? There is no distinction in principle between a valuation of this description and goods taken on bail. The parties are bound in both cases. The *Betsey*, Winpenny, 5 Rob. 295. The award includes all the expenses, \*damage to the boats, and a compensation [ \*197 ] for the loss of a valuable part of the fishing season. According to the established mode of sharing among these boats, each will take two shares and a half; so that, after all deductions, 28*l*. 14*s*. will be the amount of each share.

Court. The court observed, that if the words of sect. 9 of the act of parliament<sup>2</sup> did not bear a pretty conclusive effect, the certificate of value would be almost nugatory; such valuation, being founded upon evidence furnished by the parties themselves on the spot, must, at least, be considered as more satisfactory than what was to be found in the present affidavits. It thought that the merits of the case were similar to those of *The Vesta*; and expressed its unwillingness to disturb an award which appeared to have been made on an accurate and full examination of all the particulars. It therefore confirmed the award; and as there was no point on which the court

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<sup>1</sup> See *The Oscar*, *infra*, 258.

<sup>2</sup> 1 & 2 Geo. IV. c. 75.

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The Happy Return. 2 Hagg.

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dissented from the order of the commissioners, it was bound to confirm this award with the costs of the appeal.

Award affirmed with costs.

[ \* 198 ]

\* HAPPY RETURN, Woolcock.

July 24, 1828.

The court, upon the evidences, being satisfied that it was understood and sufficiently expressed that a person, appointed "true and lawful attorney, in the name of the master, to use all possible means for the recovery of the ship and cargo," should act as agent, and that his claim for salvage should be controlled by that understanding: *Held*, that such character, nevertheless, did not wholly supersede the character of salvor, so as to exclude the jurisdiction of the Court of Admiralty.<sup>1</sup>

The court, out of a value of 4,500*l.* gave, together with costs, 225*l.*, in addition to 815*l.* 15*s.* 6*d.* for disbursements.

*The King's Advocate* and *Addams*, for Mr. Davis.

*Lushington* and *Dodson*, *contra*.

#### JUDGMENT.

SIR CHRISTOPHER ROBINSON. This is a claim of salvage for services in recovering this ship and cargo. A previous question is raised in the act on petition, respecting the character in which this service was performed; it being alleged that Mr. Davis, the asserted salvor, acted only as agent, under power of attorney from the master; and that it is on that account not a case of salvage, but of agency, in which the party is entitled to his commission of agency, but cannot come to this court as salvor. The court is prayed accordingly to reject the claim for salvage, and condemn the party in the costs of the petition. On the other hand, it is denied that Mr. Davis acted solely as the agent of the ship, and not as salvor: for it is alleged, "he was not the appointed agent of the owners of the ship or cargo, nor did he ever consent to act as such, nor had he any credit from them, but acted solely as salvor under the power given by the master." It is further added in illustration of this position, that the appointment was expressed to be irrevocable, as not in the common

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<sup>1</sup> [See *The Purissima Conception*, 3 W. Rob. 181; *The Lively*, 3 Rob. 64.]

form of agency, but engrafted on the character of salvor; that Mr. Davis acted at his own risk as to the expenses, and that the appointment from the master was taken principally to keep off other salvors. These are the several \*positions drawing to a [\* 199 ] point, which is sufficiently abstruse and subtle as to the essential or predominant character of this service; but admitting, I think, on both sides, "that the service was rendered under a power constituting Mr. Davis agent to effect this service," whatever may be the consequence of such an appointment: and the question for the court to determine is, whether the ordinary principles on which this court allots the reward for maritime salvage were controlled, or intended to be controlled, by this appointment.

On the declaration of intention there is much contradictory evidence, which I will state briefly; meaning to pass over, without observation, many of the facts that have been introduced into the affidavits. For if the inferences arising from the instrument, and the immediate communications of the parties, do not decide this question, it will be in vain to look for a satisfactory test in more remote incidents, which may be equivocal, and might equally have attended the transaction in either view of the case. The power of attorney appoints "Robert Davis, of Cowes, true and lawful attorney, irrevocable, in the name of the master and in his behalf, to use all possible means for the recovery of the ship and cargo, and to perform all lawful acts necessary, concerning the premises." The vessel in her voyage from Penzance to London, had struck on a rock near the Needles, and sunk, on the 11th of October, 1827. The master says in his protest, "that he was solicited on the same day, by a clerk in the house of Weinhold, Davis, and Co. of Cowes, to employ the said house in the agency for the ship; and he did so appoint Davis, that others might not interfere." Brown, the clerk, says, "that he offered \* to the master his services on behalf his employers, [ \* 200 ] and recommended him to go to Cowes and consult them, to know what was best to be done, which he did."

This is the origin and commencement of the undertaking. The house immediately, on the same day, the 11th of October, wrote to Mr. Fox, as a clerk (apparently known to them in London) in the house of Bolitho and Co., the brothers of the owners of some tin forming the principal part of the cargo, advising them of the accident, and "that they had been applied to by the master for assistance, which they promised to render in their endeavors to save as much of the property as possible."

The answer to that letter appears to come from the house of Melhuish & Gray, consignees of part of the cargo, and underwriters.



They adopt Fox to act for them, and in that character a letter of introduction to Weinholt & Co. is given by them to Mr. Fox. From this letter, however, Mr. Fox acquires only a more general authority to act for all parties: it is not to be understood as being his only, or principal introduction to Weinholt & Co., for they had previously addressed their letter to him. The letter of Melhuish & Gray expresses the reliance of the writers that the assistance will be given, and more particularly, "that the charges thereon will bear that reasonable appearance which is usual with your different establishments." This is all the documentary evidence, and every thing passes between the two houses, without reference to the special claim of any individual.

Mr. Fox swears, that on his arrival he stated to Mr. Davis that he came from the underwriters, and the reason for sending him [ \* 201 ] was that all claims \*for salvage should be avoided, and whatever should be done for recovering the vessel and cargo should be considered a matter of labor, and only paid for accordingly; to which Davis readily acquiesced, and frequently expressed to the deponent that he felt much gratified that the business had been committed to his house of trade, as it gave him an opportunity of convincing the gentlemen at Lloyd's that he could act on such an occasion with honor and integrity."

Mr. Rock, a disinterested person, who accompanied Mr. Fox as his friend and companion, confirms this statement; and the account given by Mr. Pearce, who had come from Penzance, substantially agrees with it. It is contradicted, however, by Mr. Davis, who swears "that Mr. Fox did not, on his arrival, state to him that all claims of salvage should be avoided, and that all service should be paid for as labor, and that on no other conditions should persons be employed to save the ship and cargo; or that he, Mr. Davis, readily acquiesced in such arrangement."

This is such a direct contradiction of a simple fact, on the oaths of persons all apparently respectable, that the court hardly knows how to deal with it. It must endeavor to find out some tests to be derived from the nature of the things admitted to have been done, and not disputed; for, on the mere balance of credit it would be very unwilling to found any conclusions, and it would wish to avoid the painful task of entering minutely into such considerations.

It is agreed on both sides, that other salvors were to be excluded, though it does not appear in what terms that understanding [ \* 202 ] was expressed. It would \*not arise, necessarily and absolutely, from the privileges of a first salvor; according, therefore, to the accounts given of this understanding "as to other salvors,"

it is natural to suppose that some conversation passed on the subject. If that is assumed, it is also natural to suppose that the intention of the owners and underwriters would apply to all claims of salvage, as they would otherwise obtain very little advantage; and it may be expected that any distinction set up on behalf of Mr. Davis should have been noticed by him, and that proof should be given to that effect. Mere silence on such a point would confirm the representation of the owners; more particularly when it is clear that some anxiety as to charges was expressed by them in the letter of the 12th of October. The rules of law for the interpretation of such an appointment are only those of common sense and good faith. They prescribe generally, "that a procuration or order ought to be executed fully, according to the extent or bounds of the power given. If it marks precisely what is to be done, he who accepts it ought to keep to what is prescribed in it. If it be indefinite, he should set such bounds to it, or give it such extent as may reasonably be presumed to be agreeable to the intention of the person who grants it."<sup>1</sup> Mere silence, therefore, on such a point, would only confirm the representation of the owners; and on this principle the act of Mr. Davis in clothing himself with the legal character of salvor, by taking out a warrant of this court on the 19th October, before any salvage service had been performed, ought to have been communicated to the owners, if it was intended to \*be made the foundation [ \*203 ] of an adverse title against them; whereas if it was intended only to keep off other salvors, it would accord with the intention of the other party, and would be the best excuse that could be offered for this great irregularity, either to this court or to the owners.

It is clear also, I think, that some conversation passed between Mr. Fox and Mr. Davis relating to the expenses, and the accounts of charges and disbursements. Mr. Fox says "that he made frequent applications to Mr. Davis for an account of his disbursements and charges, and such accounts were promised but never delivered." Mr. Davis says "that when Mr. Fox was going to London, (which was about the 25th of October,) he desired to make out an account of his expenses and charges, and that he would accept the same for account of Bolitho & Co., the shippers of the tin; but the appearer told him he could not make out an account or demand, as the salvage was not completed." He further says, "that a few days afterwards, Mr. Fox, on his return, informed him that when in London he had mentioned his promise to settle these accounts, to some of the underwriters, who told him

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<sup>1</sup> Domat on the Civil Law, book i. tit. 15, s. 8.

that he must do no such thing, as it was a case of salvage, or to that effect." Mr. Fox denies that he ever made this last declaration.

The sense in which Mr. Fox promised to settle his accounts, is opposed to the notion of eventual proceedings, for salvage, in which the accounts would be to be rendered in this court. But the answer which Mr. Davis represents himself to have made, "that he could not make out an account or demand as the salvage was not [ \* 204 ] completed," does \* not necessarily imply that he meant to stand on his legal claim for salvage. This again is, I think, another occasion on which it would have been natural that such a right should have been asserted, if the intention was really entertained.

I abstain from adverting to the more equivocal incidents that have been referred to on one side and the other. The term irrevocable, in the appointment, affords no solid inference. It could not operate, I conceive, as an irrevocable appointment strictly ; and I rather understand that circumstance to be adverted to only as showing that it was not an ordinary agency that was so assigned, but for a specific purpose. There is as little, I think, in the circumstance alleged, that Mr. Davis was not the constituted agent of the owners of the ship or of the cargo ; or that he had no security for his expenses. The power which the master had to pledge his owners or their property in their own country was very limited, and confined to cases of necessity for the preservation of the property committed to his care. But if he had the power to bind the owners to any thing by this appointment, it would be to the obligation of paying all reasonable expenses incurred, such engagement being essentially reciprocal.

If any other notion had been entertained, some inquiry would have been made as to the value of the cargo before Mr. Davis would have proceeded to embark in the service at his own risk. So early as the 25th of October, the conversation with Mr. Fox shows that the liability of the owners and underwriters for all reasonable expenses and charges was admitted by him, and that is not in any manner controverted by Mr. Davis.

[ \* 205 ] \* On these grounds, without going into further particulars,

I am of opinion that on the part of the owners and underwriters, it was intended that the service should be entrusted to Mr. Davis in the character of agent, and that the claim for salvage should in some degree or other be limited and controlled by that understanding. I think also that such intention was sufficiently expressed, and that Mr. Davis ought to have put that interpretation upon it.

Then what will be the effect of such an appointment ? It is not contended that it will be an absolute bar to the jurisdiction of this

court, and I think it could not be opposed to any recourse to the jurisdiction of this court, that might be necessary in a case of bankruptcy or any such contingency, to support a preferable claim to salvage by proceedings *in rem*. In a case which occurred in the King's Bench,<sup>1</sup> the services of persons employed by the owners or masters of ships in distress were held to be out of the special provisions of the acts of 12 Ann, st. 2, c. 18, and the 26 Geo. II. c. 19, as those acts then stood, with respect to references to magistrates.<sup>2</sup> But Mr. Justice Lawrence, in recommending the extension of those acts to salvors employed by the owners, suggests the propriety of reserving certain cases in the Court of Admiralty and the courts of common law; implying the opinion of that eminent person that the character of agent did not necessarily supersede that of salvor, so as to exclude the jurisdiction of the Court of Admiralty. On that point I entertain no doubt; though, if cases should occur more \*proper [ \*206 ] to be submitted to a jury, on disputed facts affecting the character of parties or the customs of trade, and that means should be used to put the question in a course of trial at common law, I might on proper application be disposed to suspend proceedings here for that purpose. But after this case has stood so long on bail, taken as in an ordinary case of salvage, I think it is the duty of this court to endeavor to bring it to a beneficial conclusion, by making a positive decision upon it.<sup>3</sup> With this view I have looked to the evidence on the services that have been performed. They are considerable in the ingenuity and activity employed in contriving or superintending the measures which were adopted for raising the ship, and extracting the cargo of tin, by tongues or screws, from the hold of the vessel. As much, however, as half the cargo was extracted in this manner by another person, by an instrument which he had invented for that purpose. The service was performed not very far from Mr. Davis's usual residence. There was no peril or danger encountered by him; for, as to the accident which befel him on one occasion, in being thrown into the water by the motion of the vessel, it happened to others also, who have received no additional remuneration on that account. And when it is asked, "whether this is a charge which persons can be expected to encounter for mere agency," I can only say that others have

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<sup>1</sup> Baring v. Day, 8 East, 75.

<sup>2</sup> See the 48 Geo. III. c. 130. 1 & 2 Geo. IV. c. 75.

<sup>3</sup> December 8, 1849. In *The Spring, Hayne*, the court adopted the same course, upon a claim of salvage for the unlading and housing of goods from a wreck brought into Pagham Bay.

encountered it on this occasion even without agency. The services continued from the 11th of October to the 6th of November; [ \* 207 ] with only such intermission as was \* occasioned by the weather; and the services are admitted to have been meritoriously performed.

Reference was made in the argument to the case of *The Lord Cranstoun*,<sup>1</sup> which was a valuable West Indiamen wrecked off Beachy Head; and in which the cargo was recovered by labor from the shore under the management of Mr. Stone, and Mr. Hudson, of East Dean. I have looked at the papers of that case, and it bears a general similarity to the present.

Mr. Stone was described in that case as deputy vice-admiral, and agent to Lloyd's, and Mr. Hudson as ship agent; and it is stated in their affidavits, and therefore admitted by them, "that the master deputed them to do the best in their power to save the cargo and stores of the ship for the benefit of all parties concerned." The persons who worked under them (amounting to one hundred and thirty-six in number,) and a steam-vessel, were to be paid, not as salvors, but for the work done by agreement. The services were performed during a period of fourteen days from the 7th of December to the 21st. The expenses were large; but they were allowed by the owners, and no dispute arose respecting them. In this case, the expenses are of nearly the same amount, above 1,000*l*.; but they are strongly objected to; and, if it is desired, I think I ought to refer them to the registrar and merchants to report upon them, before I proceed finally to allot the remuneration, as the fidelity of that part of the transaction may materially affect the merits. No tender has been made, neither have the parties drawn towards each other at all in the proposal of any rate of remuneration that may appear reasonable to \* them. [ \* 208 ] Being left to work it out by myself between parties, bearing apparently considerable animosity towards each other, I shall keep as close as I can to what I find to have been done in *The Lord Cranstoun*. The deputation in that case was, I think, very much the same as the power of attorney in this. I see no reason why Mr. Davis should stand in a better situation than the deputed agents in that case; nor why the owners or underwriters should object to the settlement of this present case, in this court, in the same manner as was done there on a similar claim of persons admitted to be the agent of the underwriters, and the deputed agents of the owner. The labor, exertion, and hardship suffered in that

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<sup>1</sup> May 15th, 1827.

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case, were fully as great as in the present, though the time was shorter. I find that the whole sum decreed to be paid on that case was 1,500*l.*, including the expenses, which were 1,146*l.* and were not objected to by the owners. The value of the cargo was described as 7,000*l.*; the sum of 364*l.* was there allotted. In this case, the value is computed at 4,500*l.* by agreement; and if the parties do not agree, I shall adopt the principle which was acted upon in *The Lord Cranstoun* for my guide: and the case will stand over till I am further informed upon it.

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Nov. 13, 1828. On a subsequent day, the cause came on again on the registrar's report, in which 815*l.* 15*s.* 6*d.*, being all the disbursements claimed, (except a sum of 92*l.* on several small articles, of which the court ultimately allowed some part for additional boat hire,) were reported to be due. The court expressed its satisfaction at finding that all objections on that \* part of the case were [ \*209 ] now removed: and, adverting to the rate of remuneration allotted by the court in *The Lord Cranstoun*, awarded 225*l.* as a gratuity for the services rendered by Mr. Davis, together with his costs.

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## CALYPSO.

December 13, 1828.

The provisions of 6 Geo. IV. c. 49, and the order in council of Sept. 1825, do not apply retrospectively to cases of salvage or rescues from pirates made and adjudicated upon before the passing of that act; and the Court of Admiralty has no power of its own authority to adopt the principle of constructive salvage. The court therefore rejected the claim of the admiral to share in such part, as if that statute and order in council applied, would belong to him in the case of a rescue of a British vessel.<sup>1</sup>

*Quere*, whether the right of the admiral under 6 Geo. IV. c. 49, to share in salvage for the rescue of vessels from pirates extends to foreign ships.

ON 22d of April, 1828, a monition issued against Sir Lawrence William Halstead, late commander-in-chief of H. M. ships on the West India station, and against his agent, to bring into the registry 238*l.* (being one eighth of a certain salvage award) received by him

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<sup>1</sup> [Note of cases as to flag shares, *The Dolores*, 2 Dod. 413.]

as the flag-officer's share, or to show cause to the contrary. The money being brought in, it was alleged, in act on petition, on behalf of Francis Leardet, commander, and the rest of the officers and crew of H. M. schooner *Lion*, that, in October, 1824, the schooner was despatched by order of Admiral Halstead to cruise against pirates; that, whilst cruising in pursuance of such orders, Leardet was informed of pirates being off Cape Antonio; and his own crew being insufficient to surround them, and cut off their retreat by land as well as by sea, he applied to the commander of the U. S. schooner *Terrier*, for his coöperation; and the two schooners sailed together to Cape Antonio, and on the 5th of November, they, after several skirmishes with, and whilst engaged in pursuit of, the pirates, [ \* 210 ] \* discovered a French merchant vessel, *The Calypso*, lying in shoal water without any person on board: that *The Calypso*, with a cargo of coffee, had been seized by the pirates some days previously, and all the coffee landed and concealed in the woods at some distance from the shore: that the crews of the schooners with great difficulty and danger got off *The Calypso*, and recaptured the coffee, which were afterwards carried by *The Terrier* to Key West, an American settlement on the Florida shore; where, under the wreck and salvage laws of the Floridas, eighty per cent. of the value was awarded to the salvors, in moiety. That the British schooner's moiety was distributed by Admiral Halstead's secretary, as agent, who reserved one eighth as the flag officer's share of the salvage. And it was further alleged, that no flag-share or proportion is payable by law to the admiral or flag-officer, on account of salvage acquired by the rescue of ships and cargoes belonging to foreign nations from pirates.

On the part of Admiral Halstead, the 6 Geo. IV. c. 49, s. 1 & 2,<sup>1</sup> and the order in council of the 30th September, 1825, were in part set forth, by which order "his Majesty did declare that the produce of all ships, vessels, boats, goods, and other property of, and taken from, pirates, shall be paid, divided, and distributed to, and [ \* 211 ] amongst \*such persons, in such manner, form, and proportion, and under such regulations as are by H. M. order in council of the 23d of June, 1824, expressed and directed with respect to the distribution of the produce of seizures made by the officers,

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<sup>1</sup> By the 2d section, the distribution of the reward, payable in respect of pirates or pirate vessels taken or destroyed, is directed to be made to and amongst such persons and in such manner, form, and proportion, as his Majesty by any order in council shall declare. The 3d section, on which the judgment in this case principally turns, is recited, *infra*, p. 214.

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seamen, and marines of H. M. fleet under the laws relating to H. M. revenues of customs and excise."<sup>1</sup>

And it was alleged that by virtue of the order in council of the 23d June, 1824, a flag-officer is entitled to one of three eighth parts of all seizures thereby given to the captain of any of H. M. ships making such seizures, and being at the time under the command of a flag-officer.

In *reply*, it was alleged, that the 6 Geo. IV. c. 49, referred only to the recapture from pirates of ship and goods, the property of British subjects.

*Lushington*, for Captain Leardet.

The *King's Advocate* and *Phillimore*, *contra*.

#### JUDGMENT.

SIR C. ROBINSON. This is a question relating to the interest of the admiral on the Jamaica station, to share in a sum awarded to the captain and crew of one of H. M. vessels, under his command, for recovering a French ship and cargo from pirates. It is an incident in the case, that the salvage was awarded by an American court; but nothing arises from that circumstance which will materially affect my judgment on the question of distribution which has been submitted to me, and which must be considered as if the  
 \*property had been brought to adjudication in this court. [\*212]

I think it proper to observe, however, that it would have been more correct if the French vessel had been brought for adjudication to an English port. The commander of the British vessel appears to have been the principal taker, with whom the enterprise originated: and he was acting under the orders of his superior officer. The claim of the owners of such property to restitution is specially provided for in many treaties,<sup>2</sup> and might be affected by the relations subsisting between the country of the owner and that of the recaptor.

One consequence that has attended the carrying of the vessel to a port in Florida, has been the deduction of so very large a proportion of the property as eighty per cent. in the award of salvage, which

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<sup>1</sup> These orders of council were revoked on the 13th of July, 1827.

<sup>2</sup> Treaty of Utrecht, Art. 35, and Treaty of Commerce with France, A. D. 1786, Art. 39.



would not have happened under the decision of a British court. At the same time, as the money has travelled into the possession of the agent of the admiral, and the admiral has been made acquainted with the circumstances of the case, and has not, so far as I am informed, expressed any disapprobation of the conduct of Captain Leardet in this particular, I may presume that there were circumstances of necessity or overruling convenience that justified the act.

In point of jurisdiction<sup>1</sup> it is undoubted, that all maritime nations have that common interest in preserving the safe navigation [ \* 213 ] of the seas, that will authorize their respective courts of \* admiralty to entertain, occasionally, questions which relate to the acts and to the interests of foreigners, under circumstances that bring the cases within their local jurisdiction, and more particularly in a case like the present, in which individuals of the adjudicating country may be parties. It will be my duty therefore to proceed, on the reference which has been made to this court, as if the property had been brought within the jurisdiction of this country; and on the same principle that would have been applicable to it at the time of the recapture, unless it should be shown that there has been any rule subsequently established by due authority that will affect it retrospectively.

The act on petition proposes such a rule to the court in the statute of the 6 Geo. IV. c. 49, and in the order in council that issued in September, 1825, in pursuance of the provisions of that act. On the other side it is said, that this is not British property, and on that account not within the provisions of the statute. But I am not prepared to decide the question on this ground. It has appeared to me that a previous question arises,—whether the clause of the act of parliament, that relates to salvage, can be applied retrospectively even to British property; and if it should be the result of my decision that it cannot, *à fortiori* it will not be applicable to this case of foreign property; and I may forbear to express any opinion how far the right of the admiral might virtually, or by the discretion of this court, be extended to foreign property, under circumstances in which he would be clearly entitled to share in British property so recaptured. I will therefore, in the first place, consider the terms [ \* 214 ] of the statute. It recites the \* expediency of giving encouragement to his Majesty's ships to attack and destroy pirate vessels, and gives bounties for every pirate secured or killed, or on board at the beginning of the attack. It is well known that, at the

<sup>1</sup> Two Friends, 1 Rob. 275; Hercules, Parma, 2 Dod. 368.

termination of the hostilities in Europe, and during the unsettled state of the Spanish provinces which followed that event, great irregularities were committed by lawless associations of men, acting either with assumed commissions, or without commission, in the piratical capture of merchant vessels of all nations in the West Indies. Instructions were given to our cruisers respecting them. Many were brought to justice; and in that service great perils had been encountered by British sailors, previous to the date of this act of parliament. The act of parliament, therefore, provides by the grant of a bounty for the remuneration of persons engaged in conflicts with pirates since 1820; and proceeds to direct the distribution of the bounty according to the regulation of any order in council that should be issued by his Majesty. All this might well be done retrospectively, as it was matter of grant in which no previous rights existed, and there would be no injustice or inconvenience in distributing the bounty according to the opinion which the government might entertain of the claims of the different members of a combined force employed in that service.

The third clause of the statute<sup>1</sup> relates to salvage rendered to British ships and cargoes; and, in substance, enacts, "that if any ship, vessel, boat, goods, merchandise, or other property, found and taken in the possession of pirates, shall be \*duly proved [ \*215 ] to have belonged to, and to have been taken from, any of his Majesty's subjects, then such vessel or goods shall be restored to the former owner or proprietor, on payment of one eighth of the true value, in lieu of salvage, of such ship and goods respectively; which money shall be distributed according to the regulation that his Majesty may be pleased to appoint for the distribution of the goods and property of pirates."

The order in council issued in pursuance of the act: and directs, that the rules and regulations before established for revenue seizures shall be applied to the goods of pirates; and as salvage is to be distributed by the same rule, and as the admiral shares, according to these regulations for revenue seizures, there will be no doubt as to his interest in salvage accruing subsequent to the act. But the words of the clause relating to salvage are all prospective,—they speak of cases to be adjudicated in some competent court; whereas this case had been already adjudicated: they direct the salvage to be awarded by a decree of the same court; whereas this salvage had actually been awarded before the date of the act.

Similar observations apply also to the rate of salvage fixed by the

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<sup>1</sup> 6 Geo. IV. c. 49.

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act, and are, in that respect, perhaps, still more stringent. In settling the rate of salvage at one-eighth, the legislature may be supposed to have reduced the probable salvage that would have been decreed by the authority of the court. If a greater proportion had been given, it would be impossible to recall it, as it would be distributed; or if a smaller proportion had been given by the court, the property would have gone away, and it would be equally impossible to increase it. There is therefore a material difference between cases of bounty and salvage. The legislature must be presumed to have known the actual state of the law on this subject, which existed previous to the act, and is as ancient as the jurisdiction of these courts. It must have known, that in all cases of salvage occurring between 1820 and the time of the act in 1825, the prompt administration of the laws, which is the first duty of all courts, would necessarily have placed such cases out of the reach of retrospective provisions; and the subject-matter of that clause, no less than the terms in which it is expressed, repels the supposition that it could be the intention of the legislature to apply that clause retrospectively.

It might, however, be different with respect to the distribution of the goods of pirates, because they were matter of grant, and might therefore, without injustice or inconvenience, be governed by retrospective regulations, in the same manner as any particular mode of distribution might be embodied in the terms of the grant. I make this observation, to obviate an objection urged in the argument, that the construction suggested by the court respecting salvage might prejudice the interpretation of the order. I wish to guard against any such inference. My business is only with the clause relating to salvage in the act of parliament; and it would not be inconsistent that the order to be issued respecting recapture from pirates should be adopted prospectively for salvage, notwithstanding that the order might, with regard to pirates' goods, be drawn in terms of retrospective operation as to them.

[ \* 217 ] Another observation urged in the argument is, \*that as the act embraces two objects, it would be natural to presume that it was intended to operate from the same time as to both. The effect of this observation will depend on the terms of the several clauses, or the necessary implication arising from them; as it could not be denied that a different commencement might be assigned to the different parts of the same act, if such intention was sufficiently expressed. And it does appear to me, that both the terms of the clause relating to salvage, and the necessary implication arising from the nature of the subject, support the construction that it cannot have a retrospective operation.

In the argument, some suggestions were offered as to what might be the proper rule of distribution, independent of this statute; and as to the power which the court might have to adopt, by its own authority and discretion, the distribution established for revenue seizures. Different analogies were presented to the court as to the nature and character of this service. On the one side it was said to be of the nature of civil salvage merely; on the other, it was represented as more nearly allied to military salvage: and different rules of distribution were said to be applicable to it, according as the court might be disposed to ascribe to it one or other of these characters. But I doubt whether these services are essentially different, and whether they are not to be referred to one common origin, which takes away the effect of this distinction. It will be found, I think, that both these forms of salvage resolve themselves into the equity of rewarding spontaneous services, rendered in the protection of the lives and property of others.

\*This is a general principle of natural equity: and it [\* 218] was considered as giving a cause of action in the Roman law; and from that source it was adopted, by jurisdictions of this nature, in the different countries of Europe. This is the account which Sir William Wiseman, who was judge of this court, gives of the origin of salvage. Referring to the title in the Digest,<sup>1</sup> he says,<sup>2</sup> "Upon the equity hereof is that proceeding in the Admiralty Court clearly justified, whereby, if a ship, being set upon by pirates or by enemies, shall be rescued by another ship seasonably coming to her rescue, it charges the ship that is then redeemed with salvage money to the other that did so endanger herself to preserve her; that recompense being but in lieu of all damages thereby sustained, and for future encouragement to others to fight in the defence of those that they see assailed."

Considering all salvage, therefore, to be founded on the equity of remunerating private and individual services, a court of justice should be cautious not to treat it on any other principle. The public mischief of piratical associations may be different according to circumstances, and require different measures to repress them; and it may belong to the state to establish rules of public policy respecting them. But the court cannot safely introduce other persons to share with the recaptor on constructive grounds, without danger of increasing the salvage, to the prejudice of the owner; or of diminishing the reward, to the prejudice of the actual salvor.

<sup>1</sup> Dig. lib. 3, tit. 5.

<sup>2</sup> Law of Laws, p. 90.

[ \* 219 ] For these reasons it has appeared to me to be \* unnecessary to proceed further to inquire what might be the effect of any instances that could be collected from the practice of the navy. No adjudged cases have been produced ; and it does not appear probable that any could be found. One or two instances had occurred on the Jamaica station, but did not amount to much when they were accurately explained. In *The Charles Philippe*, in 1819, Sir Home Popham had shared : but the recaptor has now stated that he was not cognizant of that claim at the time when the payment was made by the agent ; and that he acquiesced afterwards, on consideration only that Sir Home Popham was dead ; and that he was unwilling to institute legal proceedings to obtain repayment of the share so paid, against his widow and family. There had been another case also in the time of Admiral Rowley, in which the recaptors were advised to resist the claim ; but the admiral insisting on his right, they acquiesced. It is to be observed also, that the prevailing opinion of the bar was against such a claim : and it may be inferred from thence that the experience of gentlemen, acquainted with the practice of this court, did not suggest any principles on which such a claim could be established, independent of authoritative regulations ; and that no cases had been brought forward that would have the effect of controlling or altering the general principle.

I must also refer to what was done in the courts of common law on a class of cases not very dissimilar, as arising out of a perquisite of service in the allowance of freight for the carriage of bullion in *H. M. ships*. The admirals of stations had usually shared in this [ \* 220 ] perquisite, and this practice had \* received the tacit approbation of the court in the case of *Donnelly v. Popham*,<sup>1</sup> and in other cases, in which it was assumed and admitted that the flag share was due to the admiral ;, but the question then was only, whether particular persons were entitled to rank as admirals.

In *Montagu v. Janverin*, in 1813,<sup>2</sup> the right of the admiral was resisted ; and the Court of Common Pleas held, that no authority could be attributed to such instances of silent acquiescence in the practice of the service, as they might easily be accounted for in various ways ; and finally that court decided against the admiral's claim. The authority of that decision continued to govern such cases till 1819, when the 59 Geo. III. c. 25, was passed, empowering his Majesty to make regulations for the distribution of freight-money, and a rule of distribution, including the admiral of the station, was esta-

<sup>1</sup> 1 Taunt. 1.<sup>2</sup> 3 Taunt. 442.

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The Jupiter. 2 Hagg.

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blished for all cases which had happened since the passing of the act. So, in the change which was introduced into the distribution in revenue seizures in 1816, the order in council was held to apply only to cases happening subsequent to the act.

On these grounds I do not feel that this court can properly proceed to adopt any such extended rule of distribution, merely on the ground that it may have been established for other cases. It must be extended to each particular class of cases by competent authority; and I am of opinion that the court does not possess that authority. Having before said that the act of parliament of 1825, does not, \* in my judgment, apply to this case, which happened in [ \* 221 ] 1824, I think I am not authorized to adjudge the sum in question to the admiral. It will, of course, therefore, remain to be distributed among the actual salvors.

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JUPITER, Crosbie.

January 29, 1829.

A mariner, having at Jamaica quitted the ship by order of the mate, applied to the master, who was on shore, for his discharge. The master refused, and ordered him to return to his duty. The mariner, however, engaged in another ship. Such conduct is desertion, working a forfeiture of wages.

THIS was a suit for seaman's wages, in which the claim was rejected upon the effect of the evidence in support of the owner's defensive allegation, pleading a forfeiture of wages by reason of desertion.

*Dodson*, for the mariner.

*Haggard*, *contra*.

JUDGMENT.

SIR C. ROBINSON. This is a case of wages brought by Smith, a mariner who had sailed in this ship, in February, 1827, to the West Indies, and ultimately to Jamaica, where the vessel lay from April to August waiting for a cargo. On the 10th of August certain circumstances occurred which are represented by the owner, in his plea, to amount to desertion, or wilful disobedience; while, on the other side, they are represented to have discharged the mariner from further

service, as amounting to a dismissal by the mate, who was [ \* 222 ] \* the commanding officer on board in the absence of the master on shore.

The question then is, whether the mariner quitted the vessel under justifiable circumstances, or in such a manner as will subject him to the forfeiture of wages then due. It is a question of importance to the individual, as it affects the earnings of several months, and it is also of great importance to the interests of navigation, since it involves consequences which may frequently occur, and on which the safety of the vessel and the success of the voyage may depend.

It is admitted, that, if bad weather had come on, the vessel would have been in danger of being lost for want of a stronger crew, as several of the mariners had left the ship from illness and other causes. It is manifestly of the greatest importance to the trade of this country that the duties for which mariners contract, should be substantially performed, and not be rashly or wantonly abandoned; at the same time, it is the duty of the court to protect mariners from oppression or injustice, and even from the effect of error leading to acts that might not be strictly justifiable, if they should appear to have been occasioned by unjust provocation or violent conduct on the part of those in command. With these observations I proceed to examine the evidence.

The summary petition, after a general averment of hiring and of service up to the 10th of August, sets forth — “That the mariner, being on shore, in the boat with the mate, had gone away, with his leave, in order to discharge a debt; and that, in his absence, the boat put off to the ship sooner than was intended, in consequence [ \* 223 ] of seeing \* a boat approach her with part of the ship’s cargo.”

This fact is not otherwise material than as accounting for his first absence. The mariner, it appears, returned to the ship shortly after the rest of the crew had dined and received their allowance of grog; when, as it is alleged, “the mate very much abused this man Smith, and told him to leave the ship; that he went below to get his dinner, when the mate again abused him, and ordered him to quit the ship; that Smith, however, as soon as he had finished his dinner, went to work, and shortly afterwards asked the mate for his allowance of grog, which the mate refused, and again ordered him to quit the vessel; that he thereupon went below, packed up his clothes, and finally went on shore.” According to this statement, the mate ordered this mariner on shore three several times in the space of a few minutes; the first time it would appear, in reference to his staying behind on shore — of which no notice is otherwise taken; the second time, without any cause assigned; and the third time, on the mere asking for his grog, and without any

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improper or disobedient behavior whatever on the part of the mariner.

The summary petition goes on to state, what is the most material part of the case; as these repeated dismissals are not relied upon as amounting to an absolute and final dismissal. It alleges "that the man attempted to return to his duty, but was again prevented by the mate, who refused to receive him on board; and that on the following morning Smith met the captain on shore, who asked him, 'what he was doing there,' and on being informed that the mate had discharged him, he desired him to return to his duty, and he accordingly \*returned the next day; but the mate again re- [ \* 224 ] fused him permission to come on board, and upon such refusal he returned again on shore; that on this occasion the master was on board, and heard the mate refuse to receive the mariner into the ship."

On the part of the owners, a defensive allegation contradicts this whole statement, and pleads, "that the mariner, on being ordered to return to his work, after dinner, declared, 'he would not work till his grog was served out to him,' and that the mate replied, 'If he would not work, he should leave the ship;' and that, on the next day when the master ordered him to return to his duty, he positively refused; and that he did not at any time return, or offer to return, to his duty."<sup>1</sup>

In examining the evidence, I shall advert, in the first place to the witness Merchant, who is most favorable to the mariner, and is represented to have been his friend, and to have encouraged him in his contumacious behavior; and if the case rested on his evidence alone, it would not be found to sustain the statement of the petition, either in terms or in substance. He says, "that Smith returned to the ship after dinner, and went immediately below, to eat what had been put aside for him; that after about a quarter of an hour the mate asked Smith, 'if he was coming to work, as the crew were taking in cargo.' Smith said 'he was, as soon as he had \*taken his dinner;' that in [ \* 225 ] about twenty minutes he had finished his dinner, and went to work in heaving up a hogshead of sugar, which was about as high as the gangway of The Jupiter; that Smith then asked the mate for his allowance of grog, which the mate refused, telling him he might go to hell; that Smith then asked permission to take his clothes and

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<sup>1</sup> On the admission of the allegation the court rejected two letters (written by Capt. Crosby, to his owners immediately after Smith had quitted the ship) informing them of Smith's desertion.



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things away with him, and finally quitted the vessel; and that on the next day, Sunday, upon returning to the ship, in obedience to the master's orders, the mate refused to admit him on board." This witness admits that Smith did not take his clothes with him; and he denies any conversation having passed on the Sunday on the subject of a payment for a hat which is spoken to by Peterson, the other witness examined in support of the mariner's petition.

Peterson's account is, "that Smith, upon coming on board on the 10th of August, and finding that the grog had been served out, went immediately to the mate, who was walking the quarter-deck, and asked for his grog, the usual time for its being served out having expired; that the mate refused to give it to him then, and said it was time for him to work; but that Smith said, 'he would not work, unless he had his grog,' and the mate told him, 'if he would not work he was to leave the ship;' that Smith then fetched his things, and finally quitted the vessel." This witness, in answer to an interrogatory, admits, "that the mate did not make use of any violent or abusive language."

This account differs very materially from that given by Merchant, and also from the mariner's plea; but it is an account confirmed [ \* 226 ] by Thomas, who is examined on the defensive allegation; for, by the death of the mate, the owners are deprived of his testimony.

This is the whole of the testimony on this part of the case; and it establishes a case very different from that represented in the summary petition, and shows, that whatever words were used by the mate they were spoken in answer to a contumacious refusal by the mariner to do his duty and to work. But the case hardly rests here; for it is part of the mariner's own plea, "that he was ordered by the captain to return on board, and that he was desirous so to do; and that he actually returned for that purpose." But Merchant, his own witness, does not say that he made any such declaration to the mate on the Sunday, or that he requested to see the master, who was then on board. It was his duty to have made this declaration to the mate; and also, both in justice to himself and to his owners, to have appealed from the inferior authority of the mate to the master: for that the master knew of the refusal of the mate to receive this mariner on board, is admitted to be an averment without proof. It is impossible, then, that the court can give credit to the summary petition on the evidence of Merchant alone on this point, in the absence of all proof of the natural circumstance of explanation and solicitation that ought to have accompanied a sincere desire on the part of this man to return to his duty. I think the account is incredible on

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The *Vibilia*. 2 Hagg.

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the evidence of Merchant; and it is still further contradicted by the witnesses on the defensive allegation. Thomas says, "Both he and the mate conversed with Smith on shore, and advised [ \* 227 ] him to return to his duty, but he refused." The captain also deposes, "that he advised Smith to return to his duty, but he refused, observing that his messmates would laugh at him for returning after having threatened so often to quit the ship." And the subsequent conduct of the master on the Monday is agreeable to this state of facts: for he waits on the agent of the ship *Vibilia*, and informs him "that Smith is a deserter, and warns the agent (the captain being too ill to be spoken to) and the boat's crew of that ship, not to take Smith on board."

On this view of the evidence, I cannot hesitate in pronouncing on which side the preponderance inclines; I must again say, that Smith has not proved his case either in form or in substance; but, on the contrary, he appears to have been induced, either by motives of resentment, or by a hope of better wages, which he obtained, to desert his duty to his original employers at a most critical part of the voyage, and in a quarter of the globe where the temptation to desert is notoriously strong. The court, upon the effect of this evidence, is bound to decide that Smith failed in the duty which he owed to the owners of *The Jupiter*, and that his conduct amounts to a forfeiture of his wages: and I, therefore, pronounce against his demand.

Wages forfeited.

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VIBILIA, Corbet.

[ \* 228 ]

January 29, 1829.

In a suit for wages, the owners, having pleaded the desertion of the mariner from another vessel, and the payment of his wages into Greenwich Hospital, under stat. 4 Geo. IV. c. 25, s. 11, were dismissed, without costs. *Semble*, that it would have been sufficient to allege such facts in acts of court.

SMITH, the mariner, whose wages were declared forfeited in the preceding case, sued, in this case, for the wages he had agreed for and earned on board *The Vibilia*, (the ship in which he entered at Jamaica after his desertion,) upon her return voyage to this country. In answer to this demand an allegation on the part of the owners had been admitted, pleading 4 G. IV. c. 25, s. 11, which requires owners of vessels, in which wages have been earned by mariners

deserting from another ship, to pay into Greenwich hospital the amount of such wages ; and further alleging that they had so done, and had complied with the statute.

*Lushington*, for the owners, now applied for their dismissal, and that Smith might be condemned in costs. The owners had been exposed to all the inconvenience and expense of a suit, notwithstanding they had acted agreeably to the provisions of the statute.

The Court. Some part of the expenses might perhaps have been spared by merely alleging, in an act of court, the clause of the statute, and that the owners had complied with it. There might also be an ignorance of the law in Smith ; and, although the owners were undoubtedly aggrieved by these proceedings, it would not be an effectual relief to them to decree costs against a mariner [ \* 229 ] who would probably not be in a \* condition to pay them.

The court would be sorry to be led into further proceedings in enforcing such a decree, and in a class of cases in which costs were not usually given : it will therefore not make any order as to costs ; but the court directs the owners to be dismissed.<sup>1</sup>

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<sup>1</sup> July 25, 1825.

Insolent expressions and acts of mutinous tendency not apologized for, held a forfeiture of wages.

In *The Susan*, Hamilton, the court considered the conduct of a mariner, who had taken part with another that had been put in irons, and who demanded to be put also in irons, (which was accordingly done, for insolent expressions and acts of a mutinous tendency,) and who had remained in irons for twelve days till the ship arrived at St. Helena, and did not then or at any time before retract or apologize for his misbehavior, but was there left in custody, and came finally to England in another vessel,—such as amounted to a forfeiture of the wages earned in the former part of the voyage from Calcutta.

Extract from a police record, annexed to an allegation in proof of a mariner's misconduct, rejected.

NOTE. In the summary petition a restraint imposed upon the mariner at St. Helena had been adverted to ; and annexed to the owners' defensive allegation there was an extract from the police record at St. Helena, (beginning with entries in the ship's log,) which gave a minute of the proceedings before the magistrates under which the seaman had been detained to be sent home in a ship of war ; but the court, after hearing *Addams*, for the allegation, and *Lushington*, *contrà*, rejected this part of the plea, observing that, as evidence of the particular misconduct of the mariner, it could not be received.

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ADELAIDE, Perenchief.

[ \* 230 ]

February 24th, 1829.

An inhabitant of Trinidad, after a residence of about a month at Bermuda, purchased there a slave and her four children, aged 11, 9, 7, and 3, and shortly after embarked with his family and them for Trinidad, the mother and four children being described in the indorsement on the clearance, as domestic servants in personal attendance on himself and others of his family: the owner of the vessel, who had a residence at Bermuda and Trinidad, also embarked with two slaves, born in his family, aged 11 and 7, similarly described in the indorsement. There had been no registry act in the island since 1822; but the late registrar gave a certified copy of the expired registry, and there was an affidavit of the late owner as to the birth of the youngest child. The vessel was seized while lying at anchor near the port of Hamilton, having cleared out for Trinidad, and preparing to weigh anchor. The court, on appeal, holding that the circumstances and situation in which the vessel was seized brought the case within the 5 Geo. IV. c. 113, and that the removal of none of the slaves was protected by s. 17, reversed the sentence of the court at Bermuda, and pronounced for the penalties prayed.

THIS was an appeal from the Vice-Admiralty Court of Bermuda. The libel, or information, stated, that on the 22d of January, 1827, Capt. Jones, of H. M. ship *Orestes*, seized the brig *Adelaide*, of 107 tons, as she was lying at anchor near to the dock-yard at Ireland Island in the Bermudas, and also near to the port of Hamilton, having cleared out for Trinidad, and preparing to weigh anchor. The ground of seizure was, "that the vessel had on board and was exporting, removing, carrying, and conveying seven slaves from the port of Hamilton, contrary to the form of the statute or statutes in such case provided; by means whereof the brig and slaves had become forfeited to the king." The penalties were prayed to be apportioned in thirds,—to the crown, the governor of the Bermudas, and to the seizor and his crew. A claim of restitution was made on behalf of Mr. M'Alister and Mr. Wainwright, supported by their respective affidavits, and by an affidavit of the master of the brig, as to her situation at the time of seizure, and that he had not incurred any forfeiture set forth in the information. The judge of the court below decreed restitution of the brig and slaves; and from that sentence Captain Jones appealed.

*Dodson* and *Nicholl*, in support of the sentence.

*Lushington*, for Captain Jones.

\* The *King's Advocate*, on behalf of the crown.

[ \* 231 ]

## JUDGMENT.

SIR C. ROBINSON. This is a case of appeal on the part of the seisor, from a sentence of the Vice-Admiralty Court of Bermuda, acquitting the respondents of certain forfeitures and penalties charged to have been incurred by the shipment and removal of slaves from that island. The libel states the seizure to have been made on the 22d of January, 1827, "near to the dock-yard at Ireland Island, and also near to the port of Hamilton, in the said Island, on the ground that the ship was lying at anchor at Ireland Island, having cleared from the port of Hamilton, and was preparing to weigh anchor, and had on board and was exporting, carrying, and conveying the slaves specified from the port of Hamilton, contrary to the form of the statute or statutes in such case made and provided." This description of the place, and of the cause of seizure was not controverted in any manner in the court below. The claim was given with reference to the consolidated slave act, 5 Geo. IV. c. 113, and with an explanation of the means used by the claimants to comply with its provisions, and particularly those contained in the 17th section. The parties, therefore, were at issue on the merits of the case, as distinctly as any issue could be drawn. But two objections have been raised here to the sufficiency of the information, which it is proper that I should notice.

It is objected, that the information is not sufficiently precise, as it does not negative the several exceptions that are contained in the act, as is required at common law: and several cases have [ \* 232 ] \* been cited in which that rule is fully explained.<sup>1</sup> The distinction observed in those cases is, that in clauses imposing prohibitions and penalties, it is required that exceptions, accompanying the main prohibitions, should be negatived in the information: but where the prohibition is general, and the exception arises out of a subsequent proviso, it is not required to be negatived in the information, but the defendant is expected to plead it, if it affords any defence.<sup>2</sup> In this case the prohibition in the second section is general and distinct; but embodying these terms of exception, "except in such special cases as hereinafter mentioned, or as are by this act permitted."

It might be a fair ground of argument under which class of cases this form of exception might bring such a case as the present: but I

<sup>1</sup> *Rex v. Jarvis*, 1 Burr. 148; *Spiers v. Parker*, 1 T. R. 141; *Rex v. Pratten*, 6 T. R. 559; *Gill v. Scrivens*, 7 T. R. 27; *Steel v. Smith*, 1 B. & A. 94.

<sup>2</sup> *Jones v. Axen*, *Ld. Ray.* 120.

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do not find that point to be decided. In *Steel v. Smith*, Mr. Justice Abbott takes the distinction, and observes, "Here are not in the enacting clause any words, such as 'except as hereinafter provided.' If any such words had been introduced, it might fairly have been contended that the subsequent proviso was incorporated in the enacting clause, and then the objection might have been supported." But that point does not appear to have been decided. It would ill become me to go before the courts of common law in reasoning on the common-law rule. Considering that the words "except as hereinafter provided" are only used for the sake of greater \*distinctness, and are in no manner essential to the force [ \*233 ] and effect of any proviso introduced in the subsequent part of the act, I should not anticipate, from any judgment that I can exercise on the subject, that such a distinction would be eventually sustained. But it is sufficient for me to observe, that the present case is not shown to be within any rule hitherto applied in the courts of common law.

Another objection is raised on the effect of the charge of exportation. It is said this vessel was seized at anchor off Ireland Island; that she had not quitted the port, and there could be no exportation. And the case of *Williams and Marshall*<sup>1</sup> was cited in the argument, in which the Court of Common Pleas held, that a vessel which had sailed from the London Docks to Gravesend and there anchored, had not quitted the port of London, so as to have completed the exportation, required within the time specified in her license. In that case the court rested much on the fact, that the vessel had not received her last clearing papers, which are usually delivered at Gravesend; from which it was inferred that Gravesend is a part of the port of London. In this case, nothing is shown to identify the anchorage ground, where this vessel was seized, with the port of clearance: it seems rather to be implied that the vessel had proceeded from the port of Hamilton: she was lying apparently beyond the utmost point of land or close to it; and, therefore, with reference to the limits of the port of Hamilton, I do not think the objection could have been sustained.

But the libel charges other acts besides exportation, as "shipping, conveying, removing." It \* is said these are used [ \*234 ] in connection with the term exportation; but I do not see that they are so restrained by that term as not to be capable of being maintained as a distinct and independent charge. I do not, there-

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<sup>1</sup> 6 Taunt. 390.

fore, think that either of these objections can be sustained; and I proceed to the merits of the case.

The account which Mr. M'Alister gives in his claim of his part of this transaction is, "that he is a British subject resident at Trinidad; that he arrived at Bermuda on the 5th of December, 1826, having been induced to visit that island for the benefit of his health, which was considerably impaired by an attack of fever and ague, which increased severely for several weeks after his arrival; that he found it necessary, for the comfort of himself and family, that he should have at least two additional servants as domestics; and accordingly availed himself of the first opportunity which offered to supply himself; that in a family of negroes consisting of a mother and four children, which were publicly advertised for sale, on or about the 29th of December, he found such domestics as he thought would answer his purpose; that the distress manifested by the female slave Hannah, the mother, at the idea of being separated from any of her children, induced him to consult the collector of the customs as to the number of domestic slaves which he might legally take with him to Trinidad; the collector gave his opinion that he might take two for each member of his family, consisting of himself, his wife, and infant child, namely, six of such domestic slaves; that he thereon decided on increasing his domestic establishment, by the purchase of the whole of the said slaves rather than that they should be separated, [\* 235] and as Hannah was willing to go to Trinidad, and had already a son in that island. That in consequence, he did, on the 29th of December, purchase the family, and on the same day, by bill of sale, caused Hannah and Sue to be conveyed to his wife; Daniel and Wellington to himself; and the female slave, Allan, to his infant daughter."

This is a full and particular account of the purchase, and of the motives and inducements that led to it. It seems to admit, that these slaves were purchased for exportation; for it is not till after the collector had been consulted as to the legality of exporting them, and till Hannah had expressed her willingness to go to Trinidad, that the purchase is completed.

On the fact so appearing that these slaves were purchased for exportation to Trinidad, it is contended on the part of the seisor, that this alone is a contravention of the statute, which prohibits all transfers and purchases of slaves, except "for the purpose of their being used or employed within the same island." That prohibition to purchase stood, I observe, in the 47 Geo. III. c. 36, s. 1, as relating only to removals from Africa. By leaving out that limitation, and altering the exception, as it now stands in the 13th section of the consoli-

dated act, the prohibition is said to be extended universally, saving only the exception contained in that section. This may be a formidable extension of the restrictions of the act in certain cases : but as there is no charge in the libel alleging any contravention of the act on that ground, I shall only advert to it so far as it may be connected with the illegal acts of shipment and removal, which are specifically charged in the information.

\* The justification offered by Mr. M'Alister is, that the [ \*236 ] five slaves, so purchased by him, were his domestic slaves, shipped for exportation under the exception contained in the 17th section of the act. While, on the other side, it is contended, first, that these slaves are not domestic slaves within the meaning of that section ; and, secondly, that they were not accompanied by such documents as are required in the shipment of domestic slaves, under the provisions of that section. The exception is, "that nothing in this act contained shall prevent any slave, who is really and truly the domestic servant of any person residing or being in any island, colony, plantation, or territory belonging to, or under the dominion or in the possession, of his Majesty, from attending such his owner or master, or any part of his family, to any place whatever, under the following regulations :— That the name and occupation of every such domestic slave shall be inserted in, or indorsed on, the clearance, and that the master or owner of such domestic slave shall obtain from the registry of the colony an extract certified by the registrar thereof, showing that such slave has been duly entered in the registry of the colony."

The 46 Geo. III. c. 52, s. 1, notices two descriptions of domestic servants, with some slight variation as to the form of indorsement. In the consolidated act, the distinction as to two slaves attendant on the person of each passenger is withdrawn, and the exception stands in the general terms which I have stated. It is contended, however, that the only limitation on the shipment of slaves accompanying their masters is, "that they should be domestic slaves, in opposition to agricultural slaves ; that all \* slaves employed [ \*237 ] in domestic offices, or coming within the denomination of domestic slaves, may be exported under this exception, without restraint as to number, or without any other description than that of 'domestic slaves,' without any mention of their particular occupation." That construction appears to me to be very indefinite, and liable to great abuse. It is clearly not agreeable to the interpretation put upon the act by the parties, and by the officers of the customs ; for Mr. M'Alister distributed his slaves amongst the members of his family. With respect to the form of indorsement, it is not



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agreeable to the words of the act; and they must speak for themselves. But it is on the broad ground of the *bona fides* of this transaction, with reference to the manner in which the parties have acted, in regard to this exception of the statute, that I shall decide this case.

The account given by Mr. M'Alister has been already stated. It is exposed to this observation, that it assigns different reasons for shipping different members of the family, but all apparently very inadequate reasons for embarking in an experiment of very doubtful legality, on the construction of a highly penal statute. He professes to have been actuated by motives of compassion and tenderness towards the children, and from an anxiety to prevent the separation of the family; but this is a consideration on which he was not at liberty to act in opposition to the restraints imposed by the statute. The circumstance that these slaves were going from one British island to another furnishes no favorable distinction; since the fifteenth section,

giving power to the crown to authorize such exportation is [ \* 238 \* ] very limited, and is confined \* to cases in which it shall be

made to appear to his Majesty in council, that such removal was essential to the welfare of the slaves. The law does not allow any private individual to exercise that discretion. And on this point, as well as on all other parts of this case, Mr. M'Alister would have acted more naturally, and more prudently for himself, if he had consulted the law officers of the crown, and not merely the ministerial officers of the customs.

With regard to the individuals composing this family, it is certain that they were not domestic servants of Mr. M'Alister in any sense, at the time when the exportation was first projected; and at the time of shipment, it is not without great violence to the common acceptance of the terms of the act, that the greater part of this family can be said to be really and truly the domestic servants of Mr. M'Alister or his family.

The slaves stated to have been purchased and shipped by Mr. M'Alister, for his own personal accommodation, were, Hannah, a woman of forty years of age, described formerly as a laundress, and four children, of eleven, nine, seven, and three years of age. It is not easy to understand how such persons could come within the meaning of any special exception, founded on the personal convenience or accommodation of the master. It is not suggested that the children were capable of performing any service; but it is contended that being the children of a domestic servant, they are entitled to be ranked as domestic servants for all the purposes of this act. That argument has been strongly pressed on the court; and it appears to

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be founded on the distinction adopted by the judge in the court below, in the only observation accompanying the [\*239] sentence. "The true question is," says that learned person, "were the persons domestic slaves or not? Hannah was clearly a domestic slave; and if Hannah be a domestic, I think the children must be so till they are of age to be put to some other occupation." That might be a description of such persons in a popular sense for a plantation inventory or any such purpose, but it appears to me to be a very imperfect exposition of the meaning of the terms used in this act, really and truly the domestic slaves of the master.

These terms seem to imply some specific reference to the previous title of the master, or to the use and employment of the slave, for his personal accommodation. And I do not see how they can be said to be justly complied with in either sense, in the history which is given of this transaction. If the act is indistinct in the use of the term "domestic slaves," it is precise in requiring the "name and occupation" to be entered in or indorsed on the clearance. This is a positive condition expressed in the act; and it seems to imply that the exception is granted on account of the special use or occupation of the slave, for the personal accommodation of the master, and not for indiscriminate exportation.

Without some such limitation there is nothing to prevent any number of useless children from being exported to any place. The form of the present indorsement certifies only, that Hannah, Allen, Daniel, and Wellington, have been reported to the customs as domestic servants in personal attendance on Mr. and Mrs. M'Alister, and Sue, an infant, about three years of age, as domestic servant \*to Miss M'Alister, a child of about a year and a half [\*240] old. Can any thing be understood to be certified by the terms "personal attendance" in this indorsement, with reference to such persons, more than that they were in the same ship; or can any intelligible object of the act be answered by the shipment of such persons, in such manner? It seems to be avowed, as it may be inferred from the observations of the learned judge, who was perfectly familiar with the habits and usages of the West Indies, that these children were not capable of any real occupation. I feel myself bound then to pronounce, that the whole pretext on which this shipment was made was fictitious and insincere, and contrary to the form and substance of the act.

The claim of Mr. Wainwright relates to two slaves, Bob and Belinda, of the ages of seven and twelve, shipped under the same form of indorsement, and consequently within the same objection as to their actual service and occupation.

They appear to have been born in the family of Mr. Wainwright, a resident inhabitant of Bermuda; and, in that respect, this claim is distinguishable from the former; but, on the substantial ground of *bonâ fide* employment, it appears to me to be liable to the same objection.

It may be supposed, indeed, that Mr. Wainwright would have persons in real situations of attendance on him; and, therefore, the adoption of such children as these is still more inexplicable. If two of his regular servants had attended him, I cannot but think, they would have been properly described in the indorsement, according to their respective capacities. It would have been a manifest [ \* 241 ] departure \* from the words of the act to have done otherwise. If, however, the same inaccuracy had occurred, it might then have appeared to be owing to some error in the custom-house in confounding the certificate under the present act with the former, in which personal servants might have been so described; but now the omission to insert the occupation agrees with the fact that they had no occupation. The departure from the act is not merely a defect of form, but connects itself with the substance of the case; each branch of the objection elucidates and confirms the other. Considering this claim, under all its circumstances, and in its close affinity to the other, I cannot doubt that they proceeded from the same motives; and I feel persuaded, that these slaves would never have returned to Bermuda.

In forming this conclusion, I am not insensible to the observation that has been made, on the improbability that Mr. Wainwright should endanger valuable property for any object that can be attributed to this shipment. But nearly the same difficulty occurs under any view that can be taken of the transaction. It was in opposition to the words of the statute; and as I think, in no manner agreeable to its spirit. It would be difficult, therefore, to reconcile this transaction, in any view of it, to the prudence which might be expected from Mr. Wainwright with reference to the danger to which his property was exposed; and I feel myself bound to pronounce the same judgment on this claim as on the former, and on the same general grounds. If I am wrong in the view which I have taken of the character of the transaction, I have the satisfaction to think, that the parties [ \* 242 ] will be able to correct \* that judgment by appeal to a superior court; and if that court should be satisfied of the *bona fides* of the case, it may exercise greater freedom in dealing with the mere defect of form in the instruments attending the shipment.

Having expressed the grounds on which my opinion is founded, I do not think it necessary to enter into the point relating to the

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validity of the extracts of registry ; nor to express a decided opinion on that part of the case, as it may affect other islands ; and the arguments which have been addressed to the court, on that point, are founded rather on general information and on political considerations, than on matter properly in evidence before me. As at present advised, I should not have thought myself warranted to have reversed the sentence on that ground ; but, for the reasons which I have assigned, I think that sentence is not agreeable to the terms or to the spirit of the act of parliament. I therefore reverse it on the grounds which I have stated ; and pronounce the slaves and vessel forfeited ; and condemn the respondents in the penalties specified in the third and fourth sections of the act ; but I shall not allow costs.

*Note.* The decree was afterwards superseded as to the master, it being discovered that, as to him, there had been some irregularity in the citation.

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\* CAMBRIDGE, Barber.

[ \* 243 ]

February 28, 1829.

A vessel, whose voyage was described in the articles as to Madras and Calcutta and back to London, deviated, under a new charter-party, from Madras by Prince of Wales' Island to Calcutta. The deviation, though not notified, was known to the crew, who were dissatisfied, but did not remonstrate. The mariner, who, after arriving at Calcutta, soon demanded his discharge, and refused to work, was put in irons till the unloading was completed, and then quitted the ship. Held, 1st. Such proposed deviation, entitled him to his discharge at Madras ; and 2d. His remaining on board subsequently was not an implied consent, nor, as the vessel was not, under the new charter-party, to return direct from Calcutta to England, a virtual renewal of his engagement. The whole wages, to the time of his quitting the ship, and costs, pronounced for ; though the court inclined that the mariner had acted illegally in refusing to discharge the cargo.

A spontaneous deviation of importance entitles mariners to their discharge by the law of England ; and where, by some other codes, an alteration is permitted, the mariners are to be compensated.

Deviations proceeding from accident or overruling authority do not amount to a breach of the mariner's contract.

THIS was a cause of seaman's wages. The petitioner, with several others of the crew, had quitted the vessel at Calcutta, (on account of a deviation from the voyage as laid in the ship's articles,) on the 31st of January, 1827, up to which time the wages were claimed.

*Lushington* and *Addams*, for the mariner.

*King's Advocate and Dodson, contra.*

JUDGMENT.

SIR C. ROBINSON. This is a case of wages, which involves in it a question of considerable importance to the reciprocal rights and duties of owners and mariners, as to the effect of a deviation from the voyage described in the ship's articles. But it does not appear to me that there is any blame or charge of intentional misconduct imputable to either party. The mariner is described as an excellent seaman, and of general good behavior, and as acting in this particular instance with respect and decency; and, on the part of the owners, I do not see reason to impute the resistance which has been given to his claim to any improper motives, or to any other feelings than might have been excited by a partial estimate, or a misunderstanding, of their exact rights. The ship sailed from London in July, 1826, on a voyage to Madras, Calcutta, and from thence back to her port of discharge in the East India Docks, as described in the ship's [\*244] articles. The vessel arrived in Madras Roads early in November, and landed the troops she had carried out, and there entered into a new charter-party for successive voyages, and took on board other troops, with which she sailed, in the latter end of that month, to the Prince of Wales' Island, and from thence to Calcutta. The deviation consists in the new engagements of the vessel, and in going round by Prince of Wales' Island instead of proceeding directly to Calcutta, occasioning thereby an elongation of distance, as it is computed, of about six hundred miles, and an extension of time of about a month.

This is the general outline of the case. There is no material contradiction in the evidence, though there is some difference in the statements of the pleas.

The allegation on the part of the owners pleads that the deviation, which had been before noticed in the summary petition, was made with the implied consent of the mariners, inasmuch as they were comusant of the intention, and did not express any objection. It is not pretended that any communication of the extended voyage was made to them by the master, or by his direction. On the other side, it is not denied that the crew had some intimation of the change of the course through the officers' servants, or by inference from the troops and stores taken on board; and it is said the crew were greatly dissatisfied with the alteration, though they did not object, or remonstrate, as they could have no communication with the shore at Madras, by which they might have sought advice or protection, and they were afraid of exposing themselves to severe treatment. It is proved, also, by

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the owners' witnesses, "that it was known to the master and the ship's officers, that there was much grumbling amongst the crew on account of the \*deviation." The ship proceeded to Pulo [ \* 245 ] Penang, and from thence to Calcutta, and arrived at her moorings in the river at Kedgee on the 19th of January. The master left the ship in the evening of the same day, and went to Calcutta. It appears to have transpired in some manner that the crew were dissatisfied with the deviation, and were disposed to demand their discharge on their arrival at Kedgee; and it is pleaded on the part of the owners, that they delayed to make the demand for two days whilst the master remained in the ship. But there must have been some mistake on that point, as it appears by the log that he was landed on the evening of the 19th, and went to Calcutta.

The importance attached to this slight difference as to the fact arises from the suggestion that, here again, as well as at Madras, the forbearance of the crew to claim their discharge when they might have done it, is to be taken as an implied renewal of their engagement; and, therefore, that they were strictly held to the obligation to stay by the ship, and assist in the delivery of the cargo, before they could be entitled to their wages and discharge.

It is hardly necessary to discuss the general principles of law respecting deviations, because it is admitted that the deviation was such as might have entitled the men to their discharge at Madras or Calcutta, if it had been properly demanded. The reference which has been made to the cases decided by my predecessor fully sustains that admission;<sup>1</sup> and it may not be improper to observe, \*that wherever a different principle has prevailed, it has [ \* 246 ] always been required that any alteration of the original voyage, that the owners or masters may make, shall be accompanied with notice and compensation to the mariner.

By the Danish code,<sup>2</sup> mariners are not allowed to leave their master on account of the enlargement of the voyage by a different destination, but an increase is to be made to their wages; and in Vanlinden's Institutes of the laws of Holland<sup>3</sup> I find this passage:—"With respect to the hiring of sailors, there is this distinction between it and an hiring or engagement for any other service,—that the master, although he alter the voyage, may compel them to remain in the

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<sup>1</sup> Eliza, Ireland, vol. i. 182; Countess of Harcourt, Bunn, Ib. 248; Minerva, Bell, Ib. 347; George Home, Young, Ib. 370.

<sup>2</sup> Jacobsen on Sea Laws, p. 142.

<sup>3</sup> P. 625. .

service, provided he makes them a reasonable addition to their wages."

I cite these foreign ordinances to show that, on the harshest construction of the duties of sailors, something is required from the master in the way of compensation, to reconcile them to their new engagement. The law of this country puts a freer construction on the service of mariners, as well as of other persons. It requires them, indeed, in ordinary cases, to stay by the ship till the discharge of the cargo;<sup>1</sup> but this is a duty which relates to a subsisting contract, where the other party has done nothing to supersede it. Where it has been interrupted, and this strict obligation between the parties has been loosened or relaxed by a clear breach of contract, or by ambiguous conduct on the part of the master, raising reason-  
[ \* 247 ] able doubts as to its continuance, it can be explained only on the broad principles of equity and reciprocal justice.

In the present case, no cause is assigned for this deviation, which connects it in any manner with the general object of the voyage, as growing out of accident, or overruling authority. It appears to have been perfectly spontaneous, and to have originated in a new charter-party entered into at Madras, for several voyages in the eastern seas, at an increased profit; and the ship has actually made successive voyages to Madras, Prince of Wales' Island, and places in the Straits of Malacca, and again to Calcutta; and it was not till May, 1828, that she returned to England. Immediately after the dismissal of the crew, at the time in question, she appears to have sailed again with passengers for Madras, which justifies, in some degree, the apprehension expressed by the mariner that he might be carried to sea against his will.

On the subject of deviation, in our own law, I find, in Sir Edward Simpson's notes, cases in which the necessity of going to St. Petersburg for a cargo, which the master had been disappointed of obtaining at Hamburg, and alterations, arising from stress of weather, or the order of the government, have been held not to be deviations amounting to a breach of the mariners' contract, such as would entitle them to their discharge; and, in maritime engagements, allowances are often made in the interpretation of general terms, according to the accidents affecting the common object of the original voyage. But, when no such ground of exception exists, justice and policy concur in requiring a strict observance of the  
[ \* 248 ] specified conditions of the contract; and in the present times, especially, of increased enterprise in distant com-

<sup>1</sup> Baltic Merchant, Edw. 86.

merce, considerations of this kind gain additional force from the length of voyage and extent of time for which such engagements are formed.

On the question, which seems to be raised by the owners' plea, as to which party ought to have spoken first in making or demanding the explanation, I cannot but feel that it is a little hard on the court to be required to put a severe and penal construction on such reserve as is imputed to the mariners, when a little more frankness of behavior on the part of the master might have reduced every thing to an amicable understanding between them. Now that it is admitted that the deviation was such as to have entitled the mariners to their discharge at Madras, if it had been demanded, and at Calcutta after the cargo had been unloaded, I have a right to say that the master would have done well, and I think no more than his duty, if he had treated the question openly on that principle, either at Madras or before their arrival in the river Hoogley, when the articles were read, as a sort of threat or intimidation to the crew, as it is described in the evidence.

The only point at issue now, is, with respect to four or five days, — whether the mariner, by refusing, under the peculiar circumstances in which he was placed, to work in the unloading of the latter part of the cargo, has incurred a forfeiture of the wages otherwise due to him.

The facts relating to this part of the case are shortly these : — The vessel arrived at Kedgee on the 19th of January, and the master went to Calcutta. The unlivery of the stores put on board \*at London for Calcutta, was commenced immediately. [ \* 249 ] On the 22d of January, Smith and others wrote a letter to the master, demanding their discharge ; but it was not a disrespectful letter in its terms, or in the manner of presenting it. The mate promised that the letter should be forwarded to the master ; but its delivery to him appears to have been delayed by some accident or negligence in the post. On the 24th, a letter was received from the master, and the mariners expected that it would have contained an answer to their request. It did not, however, and on receiving that communication they refused to work. The crew were mustered. The mate remonstrated with them on the consequence of quitting their duty before the cargo was unlivered, and promised them that, if they continued to work in the unlivery of the cargo, they should have their discharge if they were entitled to it.

The greater part of the crew returned to their work, but Smith and eleven others persisted in refusing, and they were put in irons, and so remained till the 31st of January. In the mean time, on the 25th of January, the expected answer from the master arrived, and he directed



the mate to inform them, "that such of the crew as were desirous of leaving the ship, should have their discharge, and their wages, upon the outward bound cargo being discharged." The purport of this letter was communicated to the crew, and to Smith, but he did not express any desire to return to his duty, though O'Brien, to whose evidence I am referring, does not recollect whether he was then actually required to return to his duty. On those assurances the rest of the crew continued to work in the unlivery of the cargo, [ \* 250 ] till the 31st of \* January, when it was completed, and such as desired to leave the ship were discharged and received their wages. Smith and his companions were released, and informed that if they would then return to their duty and remain in the ship, it should be understood that the forfeiture of their wages should not be insisted on, and that their misconduct should be overlooked. The log states this matter a little differently in the following entry : " Released the men from irons, and gave them the option of remaining in the ship or not. All hands left." But Murray says, on the owners' allegation, "that the chief mate gave Smith and the others to understand that their wages would not be paid unless they agreed to continue with the ship."

On the admission which has been made, that the mariners were entitled to their discharge at Madras, I do not know whether it would be denied that they are, at least, entitled to that portion of their wages. If it is said that by their silence they virtually renewed the original engagement, and so exposed their anterior earnings to forfeiture under the original contract, that is the utmost that could have been said, if the original engagement had been actually and entirely renewed, restoring them thereby to their benefit under it of being brought back to England, on the terms and within the ordinary period of the voyage, described in the ship's articles. But no such voyage was ever renewed. The new charter-party is represented by O'Brien to have been for two trips to Pulo Penang ; and the subsequent events have proved that if the mariners had replied on a renewal of the original engagement by their acquiescence, [ \* 251 ] they would have deceived themselves, and greatly \* to their own prejudice. The ship went indeed to Madras from Calcutta, but then she started again for Pulo Penang, and it is admitted that it would have been very disadvantageous to the men to have been discharged at Madras. The utmost therefore that can be attributed to the silent acquiescence of the mariners, in the voyage to Pulo Penang, is an engagement *de facto* for that voyage, and that they performed.

The same reasoning may be applied to the voyage to Calcutta.

Nothing was explained to the crew, that enabled them to judge how far the delivery of the remaining stores would be made at Calcutta under the original agreement. And though I think the mariners acted hastily and imprudently, and perhaps illegally in respect to that voyage, in refusing to continue to work in the discharge of the remaining part of the cargo at Calcutta, I do not think that I can justly or equitably pronounce that they have thereby incurred a forfeiture of the wages earned in the former parts of the voyage.

With respect to that small portion which may be connected with the delivery of the cargo, it is to be recollected, that, by the deviation, they were thrown into doubt and uncertainty, which may justly operate in extenuation, at least, if not in perfect justification, of their conduct. They are entitled also to some allowance for the imprisonment which they suffered; and the court must consider also, that from the manner in which the ulterior voyage was managed, in going light with passengers only to Madras, an additional labor was thrown on the men, of loading the water and rice to ballast the ship, as they unloaded the cargo; which was an act in preparation for a voyage in \*which they were to have no interest. I think [ \* 252 ] also that the use made of the supposed forfeiture to constrain them to sign new articles for indefinite voyages, under a representation that on those conditions only their wages would be paid to them, was an undue advantage taken of them, in the doubt and uncertainty in which they were placed by the acts of the master.

On these grounds, and on the authority of the Countess of Harcourt, in which the men, who refused to work after they were entitled to their discharge, had nevertheless their whole wages allowed to them, I shall make no abatement for the time of their imprisonment from the 24th of January to the 31st, when the cargo was all unlivered. There is no reason to suppose, that the ship was detained at Kedgee by their refusal, nor that greater expenses were incurred, as the additional body of Lascars only came on board on the 31st to navigate the ship; and Mr. O'Brien cannot undertake to depose, that the ship was detained thereby.

I pronounce therefore for the whole wages; and I will only add the expression of a hope that what has happened in this case, and in others that have been decided on the same principle, will be a caution to masters and owners, on these distant voyages, to act with frankness and liberality to the crew, in respect to any deviations that may affect their interests. It is by such treatment only that they can expect to retain good seamen in their employment; and it will be found ultimately to be the only beneficial principle on which such engagements can be regulated. If contingencies are incident to

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[ \* 253 ] such voyages, and can be foreseen, they \* should be provided for in the ship's articles. If they arise unexpectedly, power should be given to the master to make compensation for any deviation that may be legally considered to affect the original contract. I decree for the whole wages, as claimed, and with costs.

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MAITLAND, Studd.

May 21, 1829.

Where a vessel had been sold, in a suit of subtraction of wages, the court refused to direct proceeds in the registry to be paid out to material men, where the owners opposed the application, and the accounts were disputed. But the case being a new one, the court did not give costs.

This ship had been sold in a suit of subtraction of wages, and the present application was made on behalf of some material men, to be paid out of the remaining proceeds. The claim was made, by Mr. Davidson and Mr. Lupton, for two several sums of 600*l.* and 800*l.* for ropes, tackle, and provisions.

The ship belonged to Mr. Ferguson of Calcutta, and had been chartered in 1825, for three voyages, to Frazer & Co. of London. Under that charter-party the owner was bound to repair, and the freighter to supply provisions and pay the crew's wages. The supplies in question were furnished upon the second voyage, and upon her return to England in December, 1827, Frazer & Co. had become involved, and, as alleged, so also had Mr. Ferguson; he, however, attached the freight in the hands of the East India Company; and the men having sued for their wages, the ship was sold; and also with a view to defray a bottomry bond given by the master in India.

The *King's Advocate* for the motion. The principle adopted in

The *John, Jackson*, (3 Rob. 288, 290,) applies to British as [ \* 254 ] well as to \* foreign ships; and the owner, Ferguson, was to be considered as a foreigner, since he resided out of the jurisdiction of the court; and Davidson and Lupton had both contracted upon the joint security of the freighter, the master, and Ferguson.

*Lushington, contra.* In *The John*, the ship was foreign, and there was no opposition. Here the owner opposed the claim; and in such

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a case there was no real distinction between claims founded upon original suits, and proceeds in the registry. Here the demand also was inequitable, as the freighter was personally liable; he had become a bankrupt, so that Ferguson could only recover a dividend out of his estate; whereas, if this application were granted, it would pay the whole demand.

#### JUDGMENT.

SIR C. ROBINSON. This claim is advanced only as an exception out of a rule admitted to be generally universal. The court, therefore, may reasonably expect strong proof of authority, from precedent or principle, to enable it to maintain its jurisdiction upon such a claim; for it is the duty of the court to consider the question of jurisdiction with great caution, as well on account of the parties as of itself. If the court should exceed its just authority, it might endanger the jurisdiction hitherto retained over cases not opposed, and ultimately involve the parties in fruitless litigation. It cannot, therefore, attend to arguments founded merely on suggestions of general equity, unless its jurisdiction is clearly established. The authorities referred to are very limited; they relate only to proceeds remaining in the registry—an ambiguous term, which seems rather to apply to cases \* where no appearance has been given for the own- [ \* 255 ] ers, than to cases in opposition to their claims; as, in such cases, the proceeds can hardly be said to be remaining in the registry, being detained there only by the warrant of the court, and adversely to the demand of the owner. It may be doubtful what would be the accurate interpretation of these terms, if they could be traced in the cases which have established the exception in a certain degree. In *The John*, which has been cited, there was no opposition, and no argument; and the effect of former practice is stated only in general terms.

There does not seem to be any solid distinction between original suits and suits against proceeds, in cases that are opposed; whereas in cases unopposed, the exercise of a judicial discretion by the court, in permitting bills of this kind to be paid out of unclaimed proceeds, instead of being indefinitely impounded, may be a sound discretion and capable of being justified to that extent, notwithstanding the general prohibition. In the case referred to, the court acted with the greatest caution and forbearance; and actually refused a second claim as being too complicated in its circumstances. The authority of that case, therefore, does not extend to the present, but is rather adverse to it.

It is said that the owner is, in this case, virtually a foreigner, as he

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is living in India, and out of the jurisdiction of the courts of this country : but that fact existed at the time of the contract, and consequently these material men could not rely much on this security ; although it is suggested that they contracted under the joint [ \* 256 ] credit of three parties, \* namely, the owner, the freighter, and the master. It appears, indeed, from another circumstance, that they can have sustained no serious injury from their disappointment in not being able to sue the owner ; for it has happened, by accident only, that the ship has been brought within the jurisdiction of the court, and owing principally to the neglect of the freighter to pay certain demands which lay upon him by the charter-party. These, however, are but remote considerations ; since the particular facts are so complicated, as to be incapable of being arranged or settled by any power which this court could exercise over them. In the averments which the parties have made, they have thought it necessary to refer to accounts disputed by the other side ; and the very statement of two items, one of 4,000*l.* for repairs in a former voyage, and another of 6,000*l.* for losses in consequence of the owners' neglect in not executing the charter-party by proper and timely repairs, is sufficient to show that this is a case far beyond the ordinary interference of this court. The demand, therefore, cannot be sustained.

Upon interest and costs being applied for on the part of the owners, the court observed : — It could not decree interest for the time of detention ; nor would it be proper to give costs, as this was the first instance of a contested case in opposition to the owners' claim. It might, therefore, not be an unfit case for experiment ; but if such demands were renewed, it might then be necessary to discourage such proceedings by a condemnation in costs.<sup>1</sup>

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[ \* 257 ]

\* OSCAR, Lofgren.

June 25, 1829.

Upon an appeal from an award of magistrates in a cause of salvage, the court allowed a new appraisement to be made at the prayer and expense of the owners, (who had not by them-

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<sup>1</sup> On the subject of material men, and prohibitions in respect of their claims, in the Court of Admiralty, see Sir Leoline Jenkins, vol. ii. p. 746.

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The Oscar. 2 Hagg.

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selves or agents objected to the original appraisement,) reversed the award, and gave a fixed sum, together with their costs and losses, to each boat according to their respective merits, instead of a certain proportion of the value among them generally.

THIS was an appeal, brought by the owners, from an award of salvage made at Colchester by three magistrates of the county of Essex.

The *King's Advocate* and *Addams*, in support of the award.

*Lushington* and *Haggard*, *contra*.

## JUDGMENT.

SIR C. ROBINSON. The facts of this case are shortly these :— The Oscar, a Swedish ship, bound from Sweden to South America, with a cargo of deals, struck on the long sand off the coast of Harwich on the night of the 3d of January; she came off again, but with the loss of her anchors, and with her rudder unshipped. The master, at daylight, hoisted a flag of distress, which was answered by two fishing boats, The Whiting and The Aid, who went to her assistance: The weather was boisterous with snow and rain, and the sea rough. The master of The Oscar states that the boats came to his assistance, and by their exertions saved the ship. These particulars are set forth more in detail by the salvors, and apparently without exaggeration. The services of The Whiting and of The Aid continued to be performed with much labor, and, I think, with some danger, from Saturday morning through the whole of Sunday, and till Monday at noon, when the vessel was anchored off the West Rocks, as owing to the state of the wind and tide the ship could not reach any \* port. At noon on Monday more assistance was required, [ \* 258 ] and The Flora, another fishing boat, was hailed and came up; and soon afterwards The Samuel and The Hope came together, and with this additional assistance, the ship, on the evening of that day, was brought to anchor, and continued during the night with the boats lying round her: but it was not till the morning of Wednesday that she was moored in a place of absolute safety in the Colne river.

On these facts the magistrates, upon an appraised value of the ship and cargo at 3,400*l.*, awarded the sum of 694*l.*, being one fifth; and at the rate of 90*l.* for each boat. The expenses of the proceedings, the allowance for damage to the boats, and loss of cargoes of fish, computed at about 270*l.*, are all included in this award. The valuation was taken verbally, partly upon examination, and partly upon

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interrogation, and the carpenter who valued the deals appears to have taken no notice of duties, but to have estimated them as they might be lying in his yard for use. The ship was valued at 2000*l.*; and it is in evidence before me that she was actually insured at Lloyd's for 1,800*l.* The owners, however, were dissatisfied with that valuation; though neither their agent nor the captain appear to have made any objection at the time; and upon the appeal being prosecuted, the court was moved to grant a second appraisement: this motion was resisted by the salvors, but the court directed it to issue without prejudice to the case, and at the expense of the owners. The return to that appraisement estimates the ship at 1,200*l.*; and the cargo at 600*l.*; and as it remained still doubtful whether the original [ \*259 ] valuation had \* been made with or without the duties, the court directed a further inquiry in that respect, and the reported value of the cargo is now stated to be 600*l.* exclusive of duties.

Upon these facts the court cannot omit to observe, in the first place, that in this case much time and expense have been lost by the proceedings before the magistrates under the salvage act. That statute, the 1 & 2 Geo. IV. c. 75, was intended to provide for the reduction of expenses, and to prevent delay in small cases; and although under the general words of the eighth clause it may be competent to the magistrates to proceed in cases of greater magnitude, it is manifest that the primary object of the act was to provide for small and occasional services only, such as those specified in the act; and the magistrates cannot proceed in cases of a higher description with the same prospect or benefit or advantage to the parties. In large cases, the interest will be likely to induce one party or the other to be dissatisfied with the award, and to appeal to the High Court of Admiralty; there must then be the expense of two proceedings, which, as in this instance, will amount to nearly as much as the salvage. The owners must ordinarily, and except in cases of positive misconduct, defray these expenses, and it would therefore be an improvement of the act, if they had the power of removing the case to the Court of Admiralty in the first instance. The magistrates may judge with advantage of local circumstances, and of the value of the loss or damage occasioned to the salvors in consequence of their exertion; but they are inadequate judges of the principles that ought [ \*260 ] to govern cases of value, with reference to rules \* of general policy, or the consistent application of analogies drawn from other cases, which is so desirable to be observed: and, more particularly, they must be very ill qualified to apply a rate of proportion, as

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The Oscar. 2 Hagg.

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they have done in this, and in a former case, by giving integral proportions of the value.<sup>1</sup> The rates of simple proportion graduate at large intervals; while the estimate of services, labor, and enterprise, requires to be made as minutely as possible under an infinite variety of particulars; and may, therefore, be better done by the allowance of precise sums.

In the present case the proportion of one fifth is given as for the five boats, without any discrimination; whereas two were employed five days, and the others three days, and under very different circumstances. In consequence of the alteration in the appraisement, it is not denied that the award of salvage must be reduced. The reduction of value has been nearly one third: and taking, therefore, the value of the ship at 1,800*l.* the amount at which it was insured, and the cargo at 600*l.*, the allotment must be made upon 2,400*l.* instead of 3,400*l.* In addition to the sum at which the original proceedings and the loss and damage were estimated, there will be considerable expenses incurred by this appeal, which the owners must pay. I cannot be inattentive to these considerations in apportioning a salvage remuneration.

The services of the two first boats were, I think, very great: they were very meritoriously \* performed through two [\* 261] days and two nights, with much labor, in extremely bad weather, and not without some danger; and I feel, that in the sum which I shall allot to these two boats, I shall give less than I should perhaps have been disposed to give if the value of the property had been greater.

Whether these two boats were to have shared equally with the rest under the award I do not know; but if there was to have been any other apportionment amongst themselves, collectively, it shows still more strongly the defect of the principles on which the award has been founded. It is then, under these circumstances, the duty of the court to reverse the award, and I decree a salvage of 220*l.* to be divided among the smacks in the following manner; namely, to The Whiting and Aid, 75*l.* each; to The Flora, 30*l.*; to The Samuel and Hope, 20*l.* each; together with their expenses both before the magistrates and in this court, and the loss and damage sustained by the different salvors, the amount of which must be referred to the registrar and merchants.

Award reversed.

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<sup>1</sup> See *The Vesta*, *supra*, p. 189; also *The Salacia*, Garland, *infra*, pp. 263, 264.



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The *Salacia*. 2 Hagg.

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[ \* 262 ]

\* SALACIA, Garland.

July 2, 1829.

In cases of civil salvage, the Court of Admiralty does not recognize the rule of proportion, but awards an equitable remuneration for the service rendered, though such remuneration is more liberally allotted in cases of large value. Arbitrators having given one fourth of the ship, namely, 600*l.*, the court awarded out of the cargo, of the value of 38,000*l.*, 1,000*l.* for contingent losses; 1,500*l.* salvage reward; and 200*l.* for the master's particular expenses.

In cases of large value, and where the service has been rendered with risk to the property of the owners, the court, both in maritime and military salvage, allots a portion to the owners.

The court does not consider loose conversations, at the time the service is rendered, conclusive of the merits of the case, nor the *quantum* of reward.

The crew of another vessel on board the wrecked vessel, rather as passengers than as part of the crew, are entitled to some reward for salvage services.<sup>1</sup>

THIS was a cause of salvage instituted on behalf of the owners, master, officers, and crew of a ship called *The Washington*, of the United States of America; and also on behalf of the master, officers, and crew that had belonged to an English cutter, *The Dart*, against the owners of the cargo lately laden on board *The Salacia*.

*The Salacia*, an English ship, while on a voyage from Hull to Lima, had put into West Point Bay in Great Falkland Island on the 11th of May, 1826, for a supply of water, where she was driven on shore four times. On the 20th of May, she struck upon the rocks and was thrown on her beam ends; and in this situation was found on the 12th of June by *The Washington*; and on the 17th of June Capt. Garland, the master of *The Salacia*, requested Capt. Percival of *The Washington* to make a survey and state the condition of *The Salacia* and the means that might be adopted to rescue her from her dangerous situation. This survey was made on the 18th; when Capt. Percival and his crew, together with Capt. Duncan and the crew of *The Dart* (who had been previously wrecked on the rocks off the Falkland Islands, and received on board *The Salacia*) undertook to attempt the release of *The Salacia*, which, after unloading half the cargo, was effected on the 21st of June; and on the following day she was moored in the bay. By the 28th, her cargo was reshipped, and on the 7th of July she was ready for sea and proceeded on her [ \* 263 ] voyage to \* Valparaiso. On her arrival at that port pro-

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<sup>1</sup> [The *Hope*, 3 Hagg. Ad. R. 523.]

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The *Salacia*. 2 Hagg.

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ceedings for salvage were instituted; and a reference was made to arbitrators, who awarded 600*l.* as one fourth of the value of the ship; and it was then agreed between the consignees of the cargo and Capt. Percival that the question as to the cargo should be referred to this court.

The cargo was estimated at 38,000*l.*

*Lushington and Pickard*, for the salvors.

*Dodson and Addams*, *contra*.

#### JUDGMENT.

SIR C. ROBINSON. The court examined much at length the facts of the case as represented in the affidavits, and pronounced it to be a case of great merit; and, adverting to the arbitration on the ship, observed: The arbitrators have gone a little out of their way, perhaps, in considering what might be likely to be done by this court, intimating an expectation that it would award an equal proportion of the cargo. They awarded one fourth of the value of the ship, following perhaps a course of proceeding familiar enough in ancient times; but which is not now countenanced in the practice of this country. It is a rule which may be conveniently adopted by the authority of public ordinances with regard to war salvage, and other questions of positive regulation; but with reference to an equitable remuneration for labor or exertions of enterprise in rescuing from imminent danger a valuable property, it would be a rule of very unjust and inconvenient application.

It is a suggestion of common reason, that where the property is very large, a smaller proportion may afford adequate remuneration; and as that is the only \* true measure of reward, [ \* 264 ] it is absurd to assign fixed proportions, which must operate so very differently according to difference of value; and the danger of exciting unreasonable pretensions, and of thereby promoting litigation and preventing the best settlement of such claims by amicable arrangement, is a public inconvenience that ought as much as possible to be avoided. The rule of proportion, therefore is a rule which this court has not recognized, and will not adopt on any recommendation. The question will always resolve itself into the consideration of circumstances attending the particular case. When the amount of reward is so fixed, it will be seen what is the proportion; and it may be so expressed in popular language; but the case must be substantially determined on more particular considerations than those of proportion.

In assigning, therefore, a reward out of so large a sum with reference to the services performed, I shall be disposed to do it liberally, without any incitement from others. I will say also, that this is not a case in which the court will confine itself to giving specific sums to the individuals who were actually employed. The service was rendered with some degree of risk to the property of the owners, and, therefore, it will be impossible to keep out of view all consideration of them. Where assistance is given under circumstances that involve the owners in no danger, they are not entitled to much compensation; but, upon general principle, I think it is impossible the court can do complete justice in distributing a remuneration out of a large sum without taking into its view the danger to which their interests may

have been exposed; and many cases have occurred in which [ \* 265 ] that principle \* has been acted upon in maritime as well as military salvage. I cannot accede to the argument, therefore, that the owners are entitled to nothing, or only to a very small proportion of the reward; though I cannot at present say what limits may be proper to be assigned to their claim. There is something further necessary to be done before the court can proceed to give a final judgment upon such a claim; at the same time I have thought it my duty to express my opinion upon the facts, that they are such as entitle the persons immediately employed in the service, and also the owners, to be liberally remunerated.

Some reflections have been thrown upon Capt. Percival, for what is described as duplicity, or equivocating conduct on his part, in declaring at first "that he should not demand any salvage, but that his crew would not work unless paid for their labor, and that they declined taking a dollar a day but would accept two;" and, it is said, he made such an agreement for them. It is probable that some such conversation may have passed at the beginning of this service, but it might not be known what would be the extent of it; and the court is not in the habit of considering such loose conversations as conclusive of the merits of any case, when brought regularly before it.<sup>1</sup> In answer to such observations, it is proper to state that which appears to a contrary effect in the letter of the American consul to the owners in America. I must presume, from the station and character of this gentleman, that he could not be so biased by national feelings or favor to the owners as to misstate facts. It would be a great impeachment of his character to suppose that he could be guilty [ \* 266 ] of misrepresentation; or that he \* would apply to the con-

<sup>1</sup> [The *True Blue*, 2 W. Rob. 176.]

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The *Salacia*. 2 Hagg.

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duct of Capt. Percival terms of commendation which it did not merit. In so doing he would only lead the owners to form expectations which the event would not justify, and thereby involve them in eventual disappointment.

In his letter to the owners of the ship at Boston, dated the 20th of November, the consul thus writes, in terms of great commendation, of Capt. Percival's conduct:—"No man ever behaved better to people in distress than Capt. Percival did; and were those interested in her and her cargo well apprised of his essential services, there would be no question of their coming forward at once with such remuneration, by way of salvage, as would be worthy of them. Had the demand of Capt. Percival been carried to extremities in the courts of this country, there would be little left for the owners or underwriters in England; but moderation and confidence in the honor and liberality of the English underwriters and merchants have guided the course of the commander of your schooner, whom I consider, as do all here, to be a man of great worth, possessing humane and good feelings." I have great pleasure in reciting this testimony to the moderation as well as to the humanity of this officer, and more particularly as it is a display of these honorable qualities in the assistance rendered by a stranger and a foreigner, in the preservation of British property in a distant part of the world. The consul concludes, "The necessity of coming here, and of proceeding to other parts of this coast, have deranged the original intention of the voyage, which is a matter for consideration, and for which I hope you will be made whole."

\* This was the opinion entertained on the spot by a gentleman who was well qualified to form a just estimate of the merits and general conduct of Captain Percival, and it confirms very much the affidavits in support of the claim, and shows that Captain Percival had gone to Valparaiso for purposes which appeared fully justifiable to all persons in that place. How he was to have acted in any other manner, has not been explained. He certainly acted most beneficially to the owners in carrying *The Salacia* and this valuable cargo to the place of original consignment, which must have contributed greatly to the preservation of the property. If there was any way in which he might have retained his claim by putting a man on board, or staying a shorter time—any mode that would have reduced his demand on the score of expense and immediate loss, I should concur in wishing that course had been pursued; but if there was only the alternative of abandoning the claim for salvage, or deferring for some time the fishing voyage on which he was destined, I do not know that I can say he ought to abandon that which was a present and immediate interest for the more remote speculations of

fishing; and I must suspend my judgment on this part of the case till I can receive more particular information respecting the alleged loss of the sealing season, the substituted employment of The Washington, and the use which Captain Percival made of his time. I cannot, without knowing more than I do, decide upon the very large allowance claimed for Captain Percival, exceeding 3,000*l.*, a sum, of which it is stated he has incurred the loss, besides his expenses in coming to this country of 600*l.* or 700*l.*, making altogether [ \* 268 ] a disbursement \* for which he claims a compensation of nearly 4,000*l.* With respect to his journey to this country, I do not see that it was necessary, and I doubt whether I should be justified, without further information, in admitting that charge against the property. I cannot, then, at present, proceed to do justice to the satisfaction of all parties without further evidence. Something can probably be stated with reference to Captain Percival's subsequent employment. It is clear that he did not stay in Valparaiso, for the result of the arbitration was not finished. That fact, therefore, is in his favor. He had some object which he did not abandon for this service, which leads to a supposition that he did not stay longer than was thought necessary in the opinion of those under whose advice he was acting. He arrived at Valparaiso in August, and stayed till November. That may appear a considerable time; but, whether he could have resumed his sealing voyage sooner, or whether there was any other speculation which afforded a prospect of benefit, so as to enable the court to strike a balance between the employment which he relinquished and that which he substituted in its stead, is matter for further information.

I do not see how I can deal with this part of the case better than by referring it to the registrar and merchants to report upon those two points relating to the outgoings, as they may be called, and to the course which Captain Percival would have pursued if it had not been for his attendance on this vessel during the time he was in Falkland Island, and the subsequent time, according to what may be stated by the parties in reference to the necessity for such attendance. It is a question in which the interests of the parties are of importance, as well as \* the principle; and I am anxious not to take more from the owners than is justly due, but at the same time to do justice to those who have conducted themselves so meritoriously in the preservation of this valuable property. If, the principle being settled, the parties can approximate so as to produce offers from the owners or the underwriters that would be acceptable to the claimants, it would be very honorable to the national liberality to make such a tender, and in the other party to accept it. I have

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The *Salacia*. 2 Hagg.

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now stated my view of the case, and I shall proceed to allot a liberal remuneration when I receive the information which I require.

I do not know whether it is necessary to advert to *The Dart*. The master of *The Salacia* had received the master and crew of that ship into his vessel; and they might be expected to do something, like other parts of his own crew; yet, working, as it is stated they did, night and day, they may be held entitled to some remuneration. It is probable the principal salvors will admit their interest in some proportion, which may be settled by agreement between them, as they were acting together, and the claim is given jointly for them. The crew of *The Washington* alone might not, perhaps, have been able to effect the service. The *Dart*'s people went away in *The Washington* at last, and it cannot be said that they were so completely identified with the crew of *The Salacia* as to be precluded from advancing any claim for the services they performed. At the same time, I am not disposed to increase the award materially on their account.

July 27th. COURT. The registrar and merchants have reported the loss sustained by the owners, or persons interested in the sealing voyage, of *The Washington*, \*at the sum of 1,000*l*. [ \*270 ] This report is important for two purposes. It relieves the court from the task of forming conjectural estimates of such consequences as are attributed to the engagement of the vessel in the salvage service; and it removes, also, every doubt on the merit of the service which Captain Percival thus undertook. It establishes the fact that he did engage in such service at the probable risk of great loss and inconvenience to himself and his owners.<sup>1</sup> It was a great responsibility that he took on himself in so doing; and these considerations are important in establishing the higher character of merit in the service performed.

I have looked over the notes of such cases as have occurred of large value, with a view to form what may be deemed a proper scale of reward according to the practice of this country; <sup>2</sup> and wishing to

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<sup>1</sup> It was in evidence that another American vessel in the sealing trade had quitted West Point Bay, declining to assist *The Salacia*.

<sup>2</sup> The cases referred to by the court were *The Porcher*, *Faulkner*, (before *Trinity Masters*,) in which, upon a value of 53,000*l*., the court gave to the commander, officers, and crew of *H. M. S. Dryad*, 1,000*l*., and to the smack *Patriot*, 600*l*.; *The Balsemao*, *Alvez*, in which the court, (assisted by *Trinity Masters*, gave to two pilot boats, out of a value of 30,000*l*., 1,250*l*., thus reversing an award of 400*l*.; *The Waterloo*, *Birch*, 2 *Dod*. 442.

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The Slave, Fanny Ford. 2 Hagg.

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act liberally upon the general principles of this court, and more especially in a case relating to the meritorious exertions of a foreign master and crew in the preservation of British interests, I think I shall take a proper average estimate of the services rendered in this case in comparison with others, if I allot, in addition to the 600*l.* already given, 1,000*l.* as a compensation for the loss of the sealing [ \* 271 ] \* season and other items included in the report of the registrar and merchants, and 1,500*l.* as a gratuitous remuneration for the salvors, together with their costs.

The court, therefore, confirmed the report of the registrar and merchants; and out of the sum of 1,500*l.* it allotted 50*l.* to the master and crew of the cutter Dart, and further pronounced 200*l.* to be due to Isaac Percival, the master of The Washington, for his particular expenses.

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### THE SLAVE, "FANNY FORD."

July 18, 1829.

The 5 Geo. IV. c. 113, s. 47, is only indefinitely retrospective as to importations. The court, therefore, on appeal, reversed a sentence condemning a slave as illegally exported nine years before.

THIS was an appeal from the Vice-Admiralty Court of St. Christopher's, brought by Harriett Gardiner, a British subject resident in that island, claimant of the slave, "Fanny Ford," the sole property of the infant daughter of Mrs. Gardiner. The slave had been seized in the town of Basseterre, by a waiter of H. M. customs for that port.

The libel or information pleaded the illegal exportation of a female slave, called Fanny Ford, from St. Christopher's to the island of Saba; and it appeared from the evidence that the slave had belonged to Mrs. Ford, who had connections in business in Saba, and among them, with an old Creole woman, to whose care this "unmanageable" child was consigned; that between 1814 and 1818 the child passed from one island to the other several times, and in 1818 finally returned to St. Christopher's. She was sold on the death of Mrs. [ \* 272 ] \* Ford, and transferred by the purchaser to the present possessor. In 1827, she was seized and condemned, with costs, under the 5 Geo. IV. c. 113, s. 47.

*Dodson*, for the appellant.

## Two Slaves. 2 Hagg.

## JUDGMENT.

SIR C. ROBINSON, (after stating the above facts.) It is of great importance that all proceedings under the slave abolition acts should be instituted with great caution on the part of public officers, in order that the policy of those acts may not be rendered a source of vexation and litigation to individuals. The court cannot say that rule has been observed in this case. The act on which the information was founded, could not have been represented at any time as an intended violation of the law, though it appears to have been an irregular act, and might, perhaps, under the words of the statute, if rightly applied, have been liable to its penal provisions. Nine years, however, had intervened, during which period this person was transferred to innocent owners; and the libel now charges only the offence of illegal exportation, after the time allowed for ordinary prosecutions had elapsed. The 47th section of 5 Geo. IV. c. 113, fixes the term of five years for ordinary prosecutions, but appears to be indefinitely retrospective as to slaves which "have been, or shall at any time have been illegally imported." This is not a case of that kind, according to the precise terms of that section, in their just and natural construction. The crown officers have not advised an appearance in support of the sentence, and have thereby virtually expressed their opinion that the sentence of the court below cannot be supported.

\* The appeal has been prosecuted in *pœnam*, there being [ \* 273 ] no one to defend the sentence, and impress on my mind any other construction of the statute than what I have assigned to it. I feel myself bound, therefore, to reverse the judgment; but I shall not allow the costs of the appeal.

## TWO SLAVES.

December 1, 1828.

Where, on a voyage to North Carolina from Roseau (a port in Dominica to which the vessel belonged,) the master, discovering two slaves, from Dominica, on board, landed and delivered them up at St. Kitt's, the nearest British port he could reach, such an importation was not held to amount to a forfeiture under statute 5 Geo. IV. c. 113; and the Superior Court, upon an appeal on behalf of the crown, holding that the master was ignorant of the slaves being on board, and that the importation arose from unavoidable necessity, declined to disturb the sentence, though it was undefended on the part of the owners.

THIS was an appeal from the Vice-Admiralty Court of St. Christopher's. Two slaves, Betsey Johnson and Emma Dody, were



alleged to have been seized in the port of Basseterre by the searcher of H. M. customs, and were proceeded against under the provisions of the 5 Geo. IV. c. 113, s. 2, as forfeited by reason of an unlawful importation into that island, in a schooner called The Selina.

In an affidavit of William Baker, the master of the schooner, it was stated, "that on the evening of the day following that on which he sailed from Roseau, in the island of Dominica, to which port the schooner belonged, bound for Wilmington in North Carolina, he was informed by one of his crew that there were two women concealed in the forecabin; that he immediately sent for them, and discovered that they were slaves belonging to Dominica; that he then endeavored to reach the island of Montserrat, but without effect, as the wind was contrary; and he worked into St. Kitt's, being the [ \* 274 ] nearest British port he could make, \* where he brought the slaves before a magistrate who committed them to jail."

This affidavit and two certificates of registration, transmitted from Dominica, for the purpose of identifying the slaves, were allowed to be filed, and received in lieu of a regular claim being interposed. The judge of the Vice-Admiralty Court having declined to pronounce the slaves forfeited, an appeal was prosecuted to this court; and, after the usual proceedings, *in pænam*, for want of an appearance on the part of the owners, the King's Advocate prayed that the sentence should be reversed.

#### JUDGMENT.

SIR C. ROBINSON. The offence charged has arisen solely out of the deception practised on the master of the vessel, who appears to have been entirely ignorant that these persons were on board; and he is not contradicted or impeached in any way as to the credit of his statement, and the fairness of his conduct in the whole transaction. It is, therefore, a case of unavoidable necessity, in which the slaves, being in custody, might, I conceive, have been properly delivered to their respective owners, and ought not to have been made the subject of proceedings for forfeiture under the abolition act. On these grounds I concur in the judgment of the court below, and think that the case is not brought within the provisions of the act. The court, therefore, declines to disturb the sentence, notwithstanding the appeal is undefended on the part of the owners.

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The Margaret. 2 Hagg.

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\* MARGARET, Tomison.

[ \* 275 ]

July 25, 1829.

The court declined to pronounce forfeited a bond given for the safe return of a vessel to a particular port of this kingdom, the vessel having been carried in distress into another port, and there arrested in suits of salvage and of wages, holding, that while the vessel was within the jurisdiction of the court, safe and unsold, the application was premature.

THIS was an application to pronounce a bond, given for the safe return of The Margaret to the port of Hull, to be forfeited, and the amount paid into court for the benefit of the parties interested. The vessel had, after a voyage from Hull to Riga, returned to the port of London, in November, 1827. A second bond was then given to another part owner,<sup>1</sup> and the vessel sailed to Quebec, and upon her return having met with much bad weather, she was carried in distress, by a pilot-boat into Plymouth, where she was arrested by the process of this court in suits of salvage and of wages.

The *King's Advocate* for the minority of interests. The object of taking security will be defeated, if the vessel is not brought back to the port named in the bond, agreeably to its obligation.

*Lushington, contra.* The vessel having come \* within the [ \* 276 ] jurisdiction of the court is returned substantially into the legal possession of the owners, and they are now in the same situation as they were originally; and if all parties cannot agree about the employment of the vessel, the minority may resort to the remedy

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<sup>1</sup> March 12, 1828.

On the valuation of the ship being impeached, a new appraisement, to be made at the expense of the party applying, permitted.

The ship was appraised by the broker employed by the marshal of the court, at the sum of 1,100*l.*, and bail given upon that valuation; which being now impeached on an affidavit of the part owner, that the inventory was defective, and that shares had been sold, before the last voyage, on a valuation of the ship at 1,700*l.*, and that his own broker had appraised her at 1,400*l.*, the court permitted another valuation by a broker to be chosen by the parties interested; or, in default of agreement, by the registrar; and that the expenses of this new appraisement should be borne by the part owner.

*Note.* The appraisement having been certified at 1,150*l.*, additional security was given to the amount of 18*l.* for the part owner.

already adopted, and apply for a renewal of their bonds in case she should be about to proceed to sea. It is impossible for her to return to the port of Hull at present, as she is detained at Plymouth by the warrant of the court; but the master has stated in his affidavit that it is his intention to return with the vessel to Hull as soon as she is released.

#### JUDGMENT.

SIR C. ROBINSON. The difficulties attending these cases are, I believe, no other than necessarily belong to the relation of copartners in a property of this description. It is for the interests of navigation that such relation should exist, and it has been so considered in the commercial policy of all countries. It is the primary object of such engagements that the vessel should be employed; and if the owners do not agree, it would be a sacrifice of all interests, and of the first object of commercial policy, that she should be detained to perish in port. It is a condition of such copartnership, therefore, that the majority must prevail in deciding upon the course of employment of the vessel.

The law of some countries has gone so far as to endeavor to compromise all interests by compelling, in cases of disagreement, a sale, either of the shares of the minority, or of the whole ship, at the application of a majority of the owners, and sometimes even of [ \* 277 ] \* a moiety of interests. Such attempts appear to have been made also in this country; but the justice of such a proceeding may be questionable. Disagreements may be fomented by it; or a forced sale at particular times may be disadvantageous or ruinous to the minority. The law of England has accordingly restrained the Court of Admiralty from exercising such an authority; and no other court has assumed it. On the contrary, the courts of common law and of chancery have declined to interfere between joint-tenants in respect to the possession of their ship.<sup>1</sup>

It may be supposed that, wherever the practice of decreeing a sale in these cases has prevailed, and fuller powers have been exercised in compelling it, the present expedient of taking bonds for the safe return of the vessel, in cases like the present, was also adopted. For, to obtain a sale, it was required that it should be at the request of a majority, or at least of a moiety, of interests.

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<sup>1</sup> The law of foreign countries, and the progress of the law in our country, upon this subject, may be referred to in the *Consolato del Mare*, c. 66. The *Ordonnance de la Marine*, liv. 2, tit. 8, ss. 5, 6. *Abbott on Shipping*, p. 71, *et seq.* 5th edition. The *Apollo*, Tennant, vol. i. 311.

A bond for the ship's safe return is a remedy for a minority of co-partners; and if a sale could not be enforced directly and avowedly at their request, but required the consent of a majority or moiety of owners, it could not be the intention of the law that the same thing should be done indirectly, which could not be done directly at the request of the minority. What then is the effect of this application? To transfer to the minority an \* equivalent for [ \* 278 ] their interests, and that, from the sureties to the bond, leaving the title of ownership as it was, without a power in this court to direct a transfer of the shares of the property for which such equivalent is to be paid. This would be an anomaly in the attempt to procure a remedy in that form; and shows that if a power of such a kind is fit to be exercised by any court, it should be by courts that have greater authority than this court to deal with the titles of property. The equitable title in the shares, so accounted for, would be in the sureties, yet the legal ownership would remain; even the regulations of the registry acts would be at variance with such an equivocal assignment of the real interest.

The more I consider this question, therefore, the more I am disposed to think that the functions of this court have not been mutilated, with respect to this remedy, by the restrictions of modern practice, and that it does now exercise all the authority that could safely or conveniently be entrusted to it. The bond prescribes an obligation to bring back the vessel; and in some bonds, particularly in that which is printed in the appendix of Abbott, the terms are general, "to return," without mention of a particular port.<sup>1</sup> And it may be questionable, whether that may not be the proper extent of the remedy. When a vessel is within the protection of the country to which she belongs, she is in her general home; and the parties are restored, as to \* any legal remedies, to the situa- [ \* 279 ] tion in which they stood before the departure of the vessel.

It has been said, the part-owners may not know of the ship's return, and their interference may on that account be impracticable. That is a possible event; but in the circulation of intelligence in these times, on all public and commercial matters, it is not very probable; and it certainly will not furnish a sufficient reason for departing from the more prevailing rule of construction, if it is found adequate to the general object professed to be attained by this remedy. It is to

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<sup>1</sup> The more general form of bonds now used, is, "for the safe return of the ship to the port of—, being the port to which the same belongs." The words, "or any other port in England," are sometimes introduced.

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The Margaret. 2 Hagg.

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be observed also, that in *The Anne*, the only instance, in recent times, in which this court is shown to have proceeded so far as to pronounce for a forfeiture of the bond, where no actual loss had happened to the vessel, the terms of the decree were, to declare the bond forfeited "if the vessel did not return within a month to some port of the United Kingdom."<sup>1</sup> This form of words concurs with the general form of the bonds to which I have before adverted; and with the construction which I am disposed to put on the intention of the law in requiring them.

[ \* 280 ] In case of loss, it seems to be generally admitted \* that they might be enforced; but perhaps then only to the extent of requiring the bond to be paid into court; or if the court should go further, there would be no outstanding title to be transferred; and it could not be said that the party had another remedy, unless it were shown that the courts of common law or equity would interfere in such a case. In such an event things would be in a very different state from the present; and all questions between the owners might be terminated in a full and effectual manner. The functions of this court might be subsidiary to the final determination in higher courts; or it might go further itself, if such a proceeding should be found to be sanctioned by former practice. In the case before me the vessel is safe for the present; if she should prepare to go to sea the part-owners may resort to the same remedy as before. If the ship should be sold under the decree of this court for the payment of wages, or of salvage, it may be equivalent to destruction or loss; or, at least, that question may then be raised in a more appropriate form. For the purposes of this application it is not necessary to say what would be the final decision of the court upon such a point. All considerations concur in supporting the objection that this application is premature, and therefore the court rejects it.

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<sup>1</sup> *The Anne*, Whiteside, having arrived at Belfast, within the specified time, and afterwards at Whitehaven, her proper port, the parties cited were, in Michaelmas term, 1827, dismissed from the effect of the monition. In *The Anne*, bond had been given "for the return of the ship to the port of Whitehaven, the port to which she belonged." In *The Waterhen*, Moulson, after an appearance had been given by the majority of owners to a similar monition, the vessel arrived, and no further proceedings taking place, they were dismissed, and no costs given on either side. In that case the bond was given "for the safe return of the vessel to the port of Hull."

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The Huntcliff. 2 Hagg.

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\* HUNTCLIFF, Cole.

[ \* 281 ]

July 10, 1829.

A bottomry bond uncanceled and not delivered up, as paid, held not to be discharged by an agreement, on a settlement of accounts, between the owner and the charterer, that the latter should pay the bond, to which agreement the agent of the bond-holder was, as partner of the charterer, privy; but under which there was no evidence that, as agent of the bond-holder, he had acted or received the money. Bond pronounced for with costs.

THIS was a question relating to the asserted discharge of a bottomry bond by payment made to the agent of the bond-holder in some collateral accounts. The bond (the validity of which was not disputed) had been given at Vera Cruz, to Fontanges & Co., for 250*l.*, with twelve per cent. interest, to meet the disbursements connected with the ship, and for the payment of port dues. The ship had been chartered in London, by Mr. Butcher, the acting owner, to John Hardy, and by him consigned to Fontanges & Co., under letters of introduction from Exter, who was a secret partner with Hardy, but whose name did not appear in the charter-party. The name of Exter so becoming known to Fontanges & Co., that house transmitted the bond to him to procure payment. On the arrival of the ship, it was settled between the owner and the charterer that 96*l.* should be charged \* to the owner, as his proportion, to be [ \* 282 ] deducted from the freight, and that the remainder be paid by the charterer to Exter. This deduction was accordingly made; but it did not appear that Exter, as agent of Fontanges & Co., had been a party to that agreement, or that, in that character, he had received the money or done any thing specifically under the agreement. Hardy and Butcher had applied to Exter to give up the bond, but he always evaded the demand. The bond-holders had written to Exter for the remittance of the proceeds, but without effect. Ultimately, however, he delivered up the bond to Messrs. Harman, the substituted agents of Fontanges & Co.; and in March, 1828, a warrant was extracted by Messrs. Harman; but the service of it was defeated by the vessel putting to sea. The interest of Fontanges & Co., was then insured. In January 1829, the vessel was arrested at Liverpool on a fresh warrant; and the case now came before the court on act on petition supported by affidavits.

On the part of the assignees of Butcher, who had become a bankrupt, *Dodson* and *Addams* contended that the bond had been virtu-

ally discharged by the settlement between Butcher and Hardy, and with the privity of Exter, as the partner of Hardy, and agent of Fontanges & Co.

*Lushington* and *Pickard* argued, on the part of the bond-holders, — that nothing had been done that could amount to a legal discharge of the bond; and they denied the inferences attempted to be raised respecting the privity of Exter, and the effect attributed to his acts as against the bond-holders.

[ \* 283 ]      \* JUDGMENT.

SIR C. ROBINSON. This is a bond for the small sum of 250*l*., and the interests of the several parties from whom payment is demanded are so inconsiderable, when divided between them, that the suit must be presumed to have been defended rather from an erroneous impression of the legal effect of the acts relied on, than from any improper motive. There were in this case two parties liable for the payment of the money — the real owner, and the charterer under him, who was empowered to receive the freight and to account to the owner, according to the terms of the charter-party. Exter, however, was not a party to this instrument, though he appears to have been in some sort of secret partnership with Hardy. After he had been intrusted with the commission to obtain the payment of the bond, a private adjustment of the mode of payment of the several proportions was made by Butcher and Hardy, according to which their several shares are said to have been virtually received by, or accounted for, to Exter. The fact that such a settlement was proposed to be made, and acceded to, cannot be disputed; but it is not shown in what manner Exter was privy to it, nor what acts were done by him to bind his principal.

Looking to the peculiar nature of bottomry bonds, as given, usually to strangers and foreigners, for the advance of money for the service of the ship in a distant port, I think it is the duty of the court to look for the discharge of them in the simplest and most unequivocal form.

If it should turn aside to averments of collateral or constructive payments, growing out of the complicated relations \* of individuals, and on disputed facts, it would destroy the security of these engagements, and lead the bond-holder into a discussion of particulars, of which he must be totally ignorant, and thus expose him to litigation, that may disappoint all his prospects of a return for the advances which he has made, and involve him in fruitless expenses.

These are considerations applicable to these particular bonds, and

to the duty of the court in enforcing them. But with respect to the common principles that govern all bonds, it is natural to look to the bond itself for the proof of payment; as it is usual to deliver up the bond, or to note the payment on the instrument itself, or in some collateral receipt. In this case neither of these ordinary proofs of payment is alleged; but it is said that special circumstances may in some cases amount to a discharge without being accompanied by direct proof of payment, and that the Court of Chancery will order bonds to be delivered up, on payment to agents or other persons, for the benefit of the bond-holder. That may be so; but the Court of Chancery may exercise powers which this court cannot assume; and the mention of that authority reminds me that if such a remedy was thought to be attainable in this case, it should have been sought in that form. The defence rests on the affidavits of Forsyth, the ship-broker, of Butcher, of Hardy, and of the owner's clerk. The broker establishes the fact of the intended settlement, and the representation made by Hardy, that there was a secret partnership between himself and Exter. This, however, only explains their course of proceeding, which, so far, was natural enough; but it leaves it only as a private \*agreement between themselves, in which the [\*285] owner, who is primarily liable to the bond-holder, relies on Hardy's assurance that Exter should satisfy his proportion of the debt from the ship's funds, and makes him also the depository of the 96*l.*, which was to be deducted from Butcher's freight. Exter got into difficulties; and it is not shown that any thing was done to complete that arrangement. This is a great defect in the affidavit of Hardy, who had the means of stating all such particulars with the utmost precision. Hardy says only, that Exter was privy to the agreement, and was intrusted to collect the freight, and to pay out of it the proportion due for port charges and Hardy's share of the bond; but he does not even aver that Butcher's share of the bond was directed to be paid out of the same fund. This may be an oversight; yet still it is an imperfection in the evidence, according to their own manner of stating the case; and it shows how slightly the parties have attended to the formal and correct settlement of this account. The transaction between Butcher and Hardy, is carried no further; it remains a private understanding or agreement between them, in which Hardy is made the agent or representative of Butcher; and as the money is not traced out of his hands, he may still be answerable to Butcher; and it is incorrect to say that the loss will all fall on the latter, as he may have his remedy against Hardy and against Exter.

If Hardy had become a bankrupt the day after the alleged settle-



ment with Butcher, it could not have been contended that such a mode of settlement alone would have discharged Butcher [ \* 286 ] from his obligation as owner of the ship. More was \* necessary to be done, and was intended to have been done; but never was done. It is said that Butcher and Hardy repeatedly required Exter to give up the bond, but he evaded the demand. What is this but an acknowledgment of the owner's laches? Such conduct on the part of Exter could not fail to excite and justify a suspicion against him, yet nothing is done to bring matters to a specific settlement. Hardy might have shown, if the fact were so, that the money accounted for to him by Butcher had been carried to the private account of Exter, so as to be at his disposal for the discharge of the bond, in his separate character as agent for Fontanges & Co. That would have been a natural proceeding; and if any impediment had been raised, that was the time to have had recourse to a court of equity in order to establish the payment of the bond, and to enforce its delivery or its cancellation.

The omission to resort to that remedy is important in various ways. It deprives the owner of any ground of claim on the extraordinary powers of this court, if it possesses them; and it, moreover, casts a cloud of suspicion on the whole case, so far as concerns the acts of Hardy, and his belief that the money had been carried from his account, or the joint partnership account, to the private account of Exter, so as to be disposable for the discharge of the bond. These considerations very much weaken the defence, both in law and in fact.

It is to be recollected, also, in what state Exter stands, as to the verification of this account. In his letter to Mr. Gosling, as embodied in his affidavit, he asserts that he never had enforced the [ \* 287 ] bond, and assigns, or rather insinuates, a reason, arising \* from his own pecuniary difficulties, which induced him to advise Fontanges & Co. to place the bond in other hands; and it was, accordingly, directed to be transferred to Mr. Harman, by whom it is now put in suit. The very act of delivering up the bond to Mr. Harman is evidence to the same effect, because he never could have given it up in justice to his partner, or to the owner, if he was conscious that it had been satisfied. The partner, also, must have known this part of the case, and he ought to have made the communication to Butcher; and here, again, these parties might have applied to the Court of Chancery, if they had been advised that it could be done with effect.

Reference has been made to the letters of Mr. Fontanges, for the purpose of extracting from them a recognition or confirmation of this agreement; and, with this view, it has been argued, that they imply

a knowledge and understanding on his part that Exter was answerable to him for the payment of this bottomry bond, and that he had no thought of any further claim upon the owner of the ship. The expressions relied on are consistent with the supposition that the bond might have been paid; or that Exter, by his negligence, might have made himself responsible in the event of the owner's insolvency. But they go no further; and do not imply any belief or acquiescence, on the part of the writer, in the supposition that any thing had happened, which would discharge the owner from his liability under the bond. The facts now relied on were not communicated to Fontanges and Co. so as to lay any foundation for the argument, that they had recognized and confirmed the virtual payment.

\* The warrant of arrest was taken out in 1828, but could [ \* 288 ] not at that time be served, as the ship was absent from the country. This accounts for the interval of time, and removes the charge of delay against the bond-holder. There is also before the court the correspondence between the proctors in this cause, which shows that Butcher had, upon the warrant being extracted, engaged to pay the demand; but that engagement went off upon a dispute with the bond-holder's agent as to a further charge of 29% for insurance; and the owner then resolved to try the question, as he was advised there was a probability of resisting the demand with effect.

It is said that he is not bound by that promise, and that it is not to be regarded as an acknowledgment of the debt, as he might make the promise of payment in order to avoid litigation. Still, it is proof of a doubt existing in his mind upon the validity of the discharge; and nothing has been shown or alleged before me that establishes any solid ground of defence. It is my duty, therefore, to pronounce for the bond, and with costs.

Bond pronounced for. Costs.

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\* *LA MADONNA DELLA LETTERA.*

[ \* 289 ]

July 27, 1829.

The High Court of Admiralty declined, on the application of the claimant, and without letters of request, to interfere to enforce a monition to compel obedience to a decree made many years before by a Vice-Admiralty Court, for payment of a small sum as demurrage, against a captain, who had ceased to be within the jurisdiction of the latter court, and was resident in England.

THIS was an application, on the part of a claimant in the Vice-Admiralty Court at Malta, to enforce a decree of that court against

the captor, who had ceased to be within the jurisdiction of the Admiralty Court at Malta, but was living in England. The monition was moved for on the authority of *The Picimento*, 4 Rob. 360; and was granted under an intimation noticed in the judgment.

*Lushington*, for Captain Bligh.

*Addams, contra*.

#### JUDGMENT.

SIR C. ROBINSON. In this case there are two questions,—one affecting the jurisdiction and authority of this court to enforce the monition; the other relating to the equity of the demand. When the monition was moved for, the court observed upon the doubtful character of such a proceeding, and allowed its process to issue, in order that the experiment might be tried, and research be made for authorities to support such an interference by this court in the proceedings of an inferior court. The distinction between the case cited, and the present, was then pointed out. In *The Picimento*, this court only proceeded to do justice in a case partially adjudicated by the Vice-Admiralty Court of The Cape of Good Hope, which was suppressed, and had left other parts undetermined or unexecuted. [\*290] The jurisdiction of the local court being extinguished, the general authority of this court revived, and was proper to be maintained to prevent a total failure of justice.

In the present case there is no such reason for the interference of this court. It might depend on many particulars of a local nature whether the sentence would in this case have been enforced at Malta. Circumstances of defence or exculpation might have arisen there which cannot be within the reach or application of this court. It is not even an impossible supposition, that the proper court may even now be adjudicating on the subject, or may have decided it, if it should have happened that the captor had come within its jurisdiction. This is perhaps but an imaginary supposition, but still it is a possible objection, and one, therefore, that may be applied to illustrate the general principle.

It must be recollected, also, what the consequence might be of enforcing this monition in reviving numberless claims that may remain unsatisfied in the same manner, and to a greater extent, in different Vice-Admiralty Courts. It would be an extreme hardship on naval officers to have such questions revived against them personally in this country, when the justice or equity of the claim may perhaps in many instances have related principally to the acts of

their agents; and may be rendered doubtful by lapse of time, and the want of proper information on many points that might constitute a defence.

The court has a right to expect that it should be shown clearly from principle or precedent that such an exercise of its jurisdiction as is now required could be maintained. Nothing is produced \*to that effect; and my own researches have not [ \*291 ] enabled me to satisfy myself that I could safely enforce this monition. The regulations of the Prize Act, during the late war, did introduce some modifications of the law on the head of subsidiary interference on the part of the High Court of Admiralty, in directing distribution and other matters arising out of the proceedings of Vice-Admiralty Courts. The inference to be drawn from these modifications is, perhaps, that such powers were not thought to belong to this court independent of such statutable provisions. And it might be a risk in this court, at this time, to proceed to carry them further.

I have also in my possession a minute, which was extracted many years ago from the court books, showing that the occasion for such interference, though depending on facts very similar to the present case, was not then thought sufficient to support this form of application to this court on the part of the claimant alone, though I am not enabled to say how that case ultimately terminated. The case to which I allude was that of *The Immacolata Conceptione*, in 1748, in which a monition was prayed, on the suggestion that there had been a sentence of the Vice-Admiralty Court of Minorca, condemning part of the cargo, and restoring other parts; that there had been no appeal, and that the order for restitution could not be enforced, as the captor was in London. Letters of request were exhibited from the judge of the Vice-Admiralty Court; and it was prayed, on the part of the claimant, that this court would issue its monition, calling on the captor to make restitution, or show cause to the contrary. The note does not contain \*any further information as to [ \*292 ] what was ultimately done; and it would be necessary to look up the further proceedings, before the court could venture to act upon the authority of that case, when no similar case is known to have occurred since,—certainly not within my experience of above thirty years in the practice of this court.

On the present view of these two cases, it is to be remarked that this case does not come up to the one which I have just mentioned. It is not here asserted that there has not been an appeal; and there are no letters of request from the judge of the Vice-Admiralty Court, who ought, at least, to be a party to the application. Whether it

would be advisable that such authority should be given in the event of any future war, must be left to be determined by those who shall advise on the expediency of such a measure when the occasion may arise. There was no provision made for such a case in the late war, and there is no instance produced in which such a power has been assumed in modern times.<sup>1</sup> These considerations induce me to decline to interfere in the present case.

On the equity of the demand, I am glad to be able to say that it is but a slight claim, for one month's demurrage and interest on a cargo wrongly seized within the territory of a neutral power—the king of Sardinia. The court at Malta did not condemn the captors in costs; and there are no circumstances appearing which [ \* 293 ] induce me to \* think that it was an aggravated case, or more than an accidental mistake in the exercise of the rights of war. It is less, therefore, than the case of valuable property not restored, and stands in a more particular manner on the local experience and judgment of the Vice-Admiralty Court, with regard to many circumstances on which the determination of the case might depend, if it had been revived in that court.

Captain Bligh was at Malta twelve months shortly after the decree. His agent had come to England and died here; and it does not appear in what manner the justice of the case might be referable to the acts of the agent, or be now affected by the want of papers and information material to the question; and, I repeat, no proceeding was had against Captain Bligh at Malta, when, upon his return to that station in 1810, the jurisdiction of that court would have reached him.

The effect of the principle of limitation of time, also, under the observations made upon it in *The Mentor*,<sup>2</sup> is not inapplicable to this case; and it appears, besides, that there have been two actions instituted against this officer at common law, and that they have failed only from inaccuracy of statement, or the death of one of the plaintiffs, thus leaving a right in the representative to renew such action. There is, then, no necessary failure of justice, as the courts of common law are competent to entertain the question; and they certainly are preferable courts for cases of this description, standing on the general right of action against the person.

<sup>1</sup> On the ancient practice of letters of request, and on the execution, in this country, of a sentence of a civil law court in a foreign realm, see Sir Leoline Jenkins, vol. ii. pp. 762, 788; also Lord Holt's observations in *Green v. Walker*, 2 *Ld. Raym.* 893, and *Ewer v. Jones*, *Ib.* 935.

<sup>2</sup> 1 *Rob.* 179.

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The Duke of Bedford. 2 Hagg.

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\* The claimant is debarred by these considerations from [ \* 294 ] any right to expect an extraordinary assumption of power in this court to enforce his claim, when he has had other remedies in his reach, and has failed to pursue them effectually. On these grounds, I have the satisfaction of thinking that there is no great failure of justice to be complained of, and I may, therefore, with less reluctance, decline to interfere. The amount of the claim is only 300*l.*, and if I had any influence, I should certainly think that Captain Bligh had not successfully exonerated himself from that proportion of the demand that would, by his own admission, fall upon him. Whether that would be accepted, or whether it will be paid, I cannot say; but I do not think it improper to throw out the suggestion, as what the court might be disposed to expect if it could act with authority on the subject; but this it must decline to do, and I dismiss Captain Bligh.

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## DUKE OF BEDFORD, Morris.

August 4, 1829.

A bottomry bond, given for the necessities of the voyage by an owner on board the vessel, who could not otherwise obtain money, is valid, and supersedes a previous mortgage of the ship; the master, who was on board, but to dispossess whom a suit had been instituted, being privy and receiving the supplies as necessary, though refusing to sign the bond.<sup>1</sup> Sea-stores, particularly for the subsistence of passengers, are objects of a bottomry bond.

THIS was a question respecting a bottomry bond given at the Cape of Good Hope by the owner of the ship, who was on board, the master not being a party thereto, for securing to Messrs. Nesbit & Dickson the sum of 1,700*l.*, and premium \* thereon at ten [ \* 295 ] per cent., payable ten days after the safe arrival of the ship at her moorings in the Thames, for their disbursements on account of the ship, wages of the crew, provisions, and stores. The ship arrived in safety, and payment of the bond was refused by Messrs. Cockerell, Trail & Co., mortgagees of the ship, on the grounds of objection stated in the judgment.

*Lushington* and *Addams*, for the bond-holder.

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<sup>1</sup> [As to the authority of the owner to give a bottomry bond, see Abbott on Shipping, 6 Am. Ed., Perkins' notes, p. 151.]

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The Duke of Bedford. 2 Hagg.

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*King's Advocate and Dodson, contra.*

JUDGMENT.

SIR C. ROBINSON. This is the case of a bottomry bond granted under peculiar circumstances at the Cape of Good Hope, by the owner, who was on board the vessel, and signed this bond without the concurrence of the master. Another principal fact in the case, is, that the vessel had been mortgaged in the usual form of mortgage of vessels, by conditional assignment, before she sailed from this country. On these facts, four questions are raised in objection to the bond. 1st, Whether it was competent in the owner alone, without the concurrence of the master, to give such a bond. 2d, Whether a bond so given will, by priority, affect the interest of the mortgagees. 3d, Whether, under the circumstances accompanying the transaction, the bond-holders are chargeable with collusion, or any misconduct that will vitiate the bond. And, 4th, Whether the supply of provisions, for which this expense was incurred, for the subsistence of the passengers on board this vessel, at the Cape of Good Hope, and in the prosecution of their voyage to England, was a proper subject of bottomry.

[ \*296 ] \* The previous history of the vessel is stated in the affidavit of Mr. Brownrigg, a partner in the house of Cockerell, Trail & Co., who says "that the vessel was purchased by Thomas Stephenson, in 1825, and mortgaged to the house of Cockerell, Trail & Co. for about 6,000*l.*, which was advanced to effect the purchase." The assignment was afterwards extended to cover further running advances; and it appears that there was a special power given to the house to receive all freights. The vessel sailed in March, 1826, with Stephenson, the owner, on board, who is said, in the argument, to have gone on board, as if it was an incidental circumstance; whereas it is alleged, on the other side, that he went on board with a view to the management and control of the vessel, and with the approbation and consent of Cockerell & Co. The vessel arrived at Calcutta, after having sustained considerable damage in the river Hooghly, which occasioned repairs to the amount of 5,000*l.*, which were paid for by Stephenson, on bills drawn on Cockerell & Co. The vessel afterwards went on an unprofitable speculation to the Persian Gulf, and returned to Bombay, from which port she sailed on the present voyage in March, 1828, with a cargo belonging to, or consigned to, Cockerell & Co., and also with invalid soldiers and passengers on board, for whom Stephenson had received passage-money to the amount of 4,000*l.* And it was made a subject of complaint against Stephenson, that he had not remitted this passage-money to the house of Cockerell & Co., as he was bound to do under the assignment.

The master, who sailed from England in command of the vessel, had been dismissed at the \* Mauritius by Stephen- [\* 297 ] son, on a quarrel between them, and one or two other masters had also been changed for the same reason. The present master was appointed at Bombay, in January, 1828, and the ship sailed in March. When the vessel arrived off the Cape, she was found to be so much in want of provisions and water, that the master states, in his protest of the 14th of June, that it was imperative upon them to put into Algoa Bay or Port Elizabeth for supplies. They arrived there on the 29th of May, and lay there till the 10th of August, during which time provisions for the daily supplies were furnished by Mr. Wyatt, on personal credit, which was afterwards turned into a mortgage on the ship, but not in the form of bottomry; and though an appearance was given for that gentleman in this cause, it has been withdrawn, and it is mentioned only as an incident filling up the calamitous history of this vessel.

Whilst the ship lay at Port Elizabeth, Stephenson and the master quarrelled, and Stephenson attempted to dispossess him; and took out a citation for that purpose from the Vice-Admiralty Court at the Cape on the 17th of July; and these proceedings were depending till the 27th of September, when Stephenson's suit was dismissed. In the mean time the vessel had sailed from Port Elizabeth to Table Bay on the 10th of August, and arrived on the 25th. Immediately on the arrival, Stephenson applied to Messrs. Dickson & Nisbet, merchants and agents to Lloyd's, to furnish provisions for the voyage to Europe, and for the daily supplies of the passengers during the detention of the vessel. That house engaged to furnish the supplies on bills on Cockerell & Co., \* if Stephenson had a [\* 298 ] letter of credit on them, otherwise on bottomry; and, on a declaration on his part that he had no letters of credit, they required that the accounts should be settled, and a bottomry bond given before the vessel sailed.

This is the substance of the two or three letters annexed to the affidavit of Mr. Dickson, one of the bond-holders, who has negatived the principal facts relied on in the act on petition as affecting the transaction. He denies the knowledge of any other funds in the possession of Stephenson; and the suggestion raised by the master, that the supplies were furnished from their own stores without competition, and at their own prices; and he maintains, generally and sufficiently so far as lies upon the bond-holders, the fairness of the whole transaction.

The objections raised to the bond in the act on petition are: that Nisbet & Dickson knew that the ship was mortgaged to Cockerell



& Co.; that Stephenson had other funds, particularly 1,000*l*. in bills on the missionary society; and that, as the bond was given by Stephenson and not by the master, it was essentially invalid. In the argument, the conduct of Nisbet & Dickson has been represented as in collusion with Stephenson to the prejudice of the mortgagees, though the act does not specifically charge collusion. The evidence, which has been referred to in support of the objections, is to be found in the protests of the master at the Cape, and in four or five letters which passed between him and Nisbet & Dickson on the first and second of October. The master has not made any affidavit, having since quarrelled with the house of Cockerell & Co.; and, as [ \* 299 ] Stephenson remained \* at the Cape, the court is without the benefit of the best and most direct information that might be material on many points.

I have already observed, that the suit for dispossessing the master, Morris, was depending till the 27th of September. When that suit was terminated, he wrote to Nisbet & Dickson on the 1st of October, stating that he had been referred to them by Stephenson for the sea-stores, and was urgent to have them shipped. He expresses also his own expectations, that they would be supplied on the personal credit of Stephenson, as the vessel was fully mortgaged to Cockrell & Co., and, more particularly, as Nisbet & Dickson had not consulted him on the mode of payment. Two letters of the 2d of October repeat the same thing in different words, and express his surprise on learning that the supplies were to be furnished on bottomry; though I think that must have been understood before. Morris observes also, "that if Stephenson had any funds, he should be glad that the stores should be furnished on his credit; but if not, Stephenson had no power to sign a bottomry-bond; and he, as master, would not do it." Nisbet & Dickson express themselves satisfied with the security offered by Stephenson, in terms that are a little equivocal and liable to some observation on that account, as if they were written with a design to evade Morris's inquiries. But, advertng to the distinct declaration of their letter of the 25th of August, "that they should require a bottomry-bond," and to what must have been the understanding of the parties in the daily communications that passed between them, I cannot doubt, that the master was perfectly cognizant of [ \* 300 ] \* the terms on which the supplies were to be furnished: they had been in preparation during the whole time since the 25th of August, and were ultimately shipped on the urgent request of the master, so as to enable the vessel to have sailed on the 12th of October, if she had not been detained by another cause till the middle of November. It is to be observed also, on that passage in Mor-

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ris's letter which refers to funds in the hands of Stephenson, that he does not assert there were such funds, and seems rather to taunt him with the supposition that he had no such funds, — only saying, "if he has funds, I shall be glad that the stores should be supplied on his credit." The effect of this is material, as contradicting the suggestion, now made, that he had such funds, and that they were known to Nisbet & Dickson in such a way as would affect the bond.

It is clear, that Morris recognizes throughout the necessity of supplies, and does not point out any other resource than bottomry. It has been said, that Stephenson had the 4,000*l.* received from the passage money: but that is not suggested in the act on petition, nor in the correspondence of Morris; and it is expressly denied by Mr. Dickson; and it was probably not the fact, as Stephenson may be supposed to have had occasion for the employment of such funds in India. Adverting to the result of the inferences to be derived from the correspondence, and to the general principle, that all presumption is strongly in favor of the integrity of the transaction, and that bottomry-bonds are not to be affected to the prejudice of the bond-holder but on proof of the objections raised against them, I have no hesitation in overruling that \*objection, and in pro- [\*301] nouncing, that there is nothing whatever appearing in the conduct of Nisbet & Dickson to their prejudice in this transaction.

With respect to the nature of the supplies, I shall omit to say anything at present. On such parts of them as might be furnished for daily consumption on land, and were never subjected to sea-risk, because I do not know how great a part of the debt was incurred on that account, nor indeed whether these supplies are included in the bond; that may be a subject of distinction afterwards, if it can be sustained; but it will be necessary that the fact should be established first on a reference to the registrar and merchants, which is the prayer of both parties, if the court should be of opinion that the bond is not invalid.

With respect to the sea-stores, I see no reason for distinguishing them from any other supplies that may be necessary for the service of the ship; "*pour les depens de la nef, s'il y a besoin de victuailer,*" — "*in causâ necessitatis, pro servandâ nave et bonis,*" according to the general definition given of these bonds by writers on maritime law. The stores in this case were to be appropriated to the subsistence of the passengers, (who may be considered as cargo in this view,) and by whom a large payment had been made as passage-money, in the nature of freight; and if that money had been received for the benefit of the mortgagees under the assignment, it removes every ground of objection to the equitable operation of this bond, as against them, for

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the supplies of these provisions, if the bond shall be found otherwise to affect them.

[ \* 302 ] I come now to the principal objection of law, \* as to the competency of the owner alone to give a bottomry bond, in a foreign country, for necessary supplies to the ship, without the concurrence of the master. There would be no doubt, I conceive, on this point according to the general principles of maritime law in other countries, as they are laid down in books of the highest authority, by Pothier,<sup>1</sup> Emerigon,<sup>2</sup> Valin,<sup>3</sup> and Bynkershoek.<sup>4</sup> And although foreign writers combine the two descriptions of bottomry together, which may produce some ambiguity as to particular expressions, I think the writers just referred to speak clearly to the same effect, as to privileged bonds of this nature granted for the necessities of the voyage, that they may be granted either by the owner or master, according to circumstances.

With regard to the law of this country, the authority of a case decided in this court in 1801, though without opposition, seems to establish the same principle, under circumstances in which the owner was also the master of the vessel.<sup>5</sup> It would be absurd, however, to suppose that he could be considered in both characters of owner and master, as in reference to several powers. The latter must be absorbed in the former. It would be a case indeed, in that view of it, of an owner without a master on board; and, in the present case, there was a master on board; but it goes a great length towards the circumstances of the present case; and if it presents any distinction it might be this, — that where a master was present, he might

[ \* 303 ] deny the cause of necessity, or show \* that the owner had other funds, or he might impeach the sincerity of the transaction in any way; and that might raise a material objection so far as third parties were affected by the transaction. But, in the present case, the master has done neither of these; he has confirmed and adopted all the acts of the owner in demanding and receiving the supplies as essentially necessary for the completion of the voyage; and he has failed to point out any other resources, or any substantial objection; he has only refused to sign the bond for fear of pledging the mortgagees, as he conceived; although he did not scruple to urge the delivery of the goods for the service of the ship, and the earning of a freight on their account. The possible distinction, therefore, is

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<sup>1</sup> Vol. iii. p. 97.

<sup>2</sup> Vol. ii. p. 378, *et seq.*

<sup>3</sup> Comm. de la Marine, liv. iii. tit. 5, art. 8, *et seq.*

<sup>4</sup> Vol. vi. p. 515.

<sup>5</sup> Barbara, Chegwin, 4 Rob. 1.

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as little substantial, and as purely formal, in this case as can be conceived. Adverting also to the authority which the owner had always exercised in this ship, and with the consent of Cockerell & Co.; and in communication with them on the subject of the repairs at Calcutta; seeing that foreign writers expressly state that where there are more persons than one in authority, it may be doubtful which is master; and that where there is a supercargo, his authority might supersede the ordinary sailing-master, it is very doubtful what effect is to be attributed to the mere refusal of the master, in such a case as this, to sign the bottomry bond. I must remember, too, that during the pendency of the suit to disposes the master, it would have been very doubtful whether he could have acted with authority for this purpose. His acts might have been liable to more objections than those of the owner; and it will not be the disposition of the court to suppose a case, in which a ship would be \*de- [ \*304 ] prived of the resources of bottomry, which may be essential for the preservation of the interests of all concerned in the voyage; and for that reason it is allowed to be virtually within the power of an acting master, though not appointed by the authority of the real master.

The only doubt, which occurs to me on this point, arises from the limited jurisdiction allowed to this court, which has been confined usually to the cases of bonds given by a master at a distance from the owners; but that would be an objection rather to the jurisdiction of the court, than to the essential quality of the bond; and as the objection has not been raised, and may yet be raised, if it should be thought advisable, I shall not think it my duty to anticipate such an objection, after the cases to which I have referred, of bonds given by owners alone, and which have been sustained in this court. I feel myself bound therefore to uphold this bond.

On the remaining question, how far it may affect the demands of Cockerell & Co. with priority, I have already adverted to the operation of the bond in protecting their interests. It is the general character of bottomry bonds to supersede even former bonds of the same species, on the supposition that they operate for the protection of all prior interests. That must be held to be the effect of the bond in this instance; and I think it may even be doubtful, whether the mortgagees might not be sued for such expenses in another form, if the bond should be held not to affect them. For the reasons, however, which I have assigned, I pronounce generally for the validity of this bond.

*Note.* The bond was paid without a reference to the registrar and merchants.

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[ \* 305 ]

\* JOHN, Horn.

February 6, 1830.

In a cause of possession the court will not examine the title of a person in *bond fide* possession of a vessel till it is impeached. Where the only title rests on a conditional assignment of a vessel as a security not reduced into possession, the Court of Admiralty has not jurisdiction to disturb the person actually in possession under a subsequent sale; nor does it vary the case, because the question comes before it on appeal from a Vice-Admiralty Court which has exercised the jurisdiction, more especially as the merits disclosed did not appear to warrant the decision. Sentence reversed. Vessel restored with demurrage. An appeal may be prosecuted after twelve months have elapsed from the sentence, the delay being occasioned by unavoidable circumstances.

THIS was an appeal from a decision of the Vice-Admiralty Court of Gibraltar, where, on the 27th of June, 1827, proceedings had been commenced by William Cosens, attorney of William Cole, the asserted sole owner of the ship John, to recover possession thereof from Jacinto Isnardy; and on the 12th of November the court pronounced for the legal title of Mr. Cole, and decreed to him the possession. On the 26th of November, 1827, Isnardy alleged an appeal to the High Court of Admiralty; but the power of attorney, authorizing his agent in this country to prosecute the appeal, did not arrive in England till the 1st of December, 1828, nineteen days after the regular time for prosecuting an appeal had elapsed. On the 5th of December, on motion of counsel, founded upon an affidavit to the effect, that Isnardy was prevented from obtaining from the court at Gibraltar the papers necessary to enable him sooner to prosecute the appeal, in consequence of the fever then lately prevalent at Gibraltar, the court allowed the appeal to be prosecuted. An appearance was then given for Mr. Cole, the respondent, under protest, alleging, that leave had been given to prosecute the appeal on an *ex parte* statement, not borne out by the facts; and that it being in the power of Isnardy to have prosecuted his appeal in due time, no sufficient ground was laid for the special indulgence of the court. This protest, [ \* 306 ] after argument, was overruled, the court observing, — “The period of twelve months for the prosecution of an appeal is not a statutable period, but is a regulation growing out of the general law of nations and of the civil law, and which it is in the discretion of the court to relax; in the present case, the excess of time is not such as leads the court to suppose that the party had intended to abandon his appeal; and he alleges that he has been prevented from the due prosecution of it only by the plague or fever which raged so violently at Gibraltar, as to interrupt all business, and which prevented him from obtaining the papers. Some doubt is raised as to

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the sincerity of this excuse, but there is no dispute as to the state of the garrison; and the papers were actually sent before the expiration of the year, and arrived within a month afterwards. These circumstances induce me not to depart from my former order, and I overrule the protest."

Mr. Cole having appeared absolutely, the cause was argued, on his behalf, by *Phillimore* and *Addams*; and by the *King's Advocate* and *Lushington*, for the appellant.

JUDGMENT.

SIR C. ROBINSON. This is a case of appeal from the Vice-Admiralty Court of Gibraltar, in a suit of possession, instituted there on the part of the asserted owner, to recover possession of this vessel out of the hands of another asserted owner who had purchased the vessel in March, 1825, from the British consul at Malaga. The circumstances are very complicated, and the evidence is not so clear and distinct as the court is in the habit of \*requiring in cases of [ \* 307 ] this nature. When I have stated the principal facts of the case, two questions will arise: 1st, Whether the Vice-Admiralty Court was justified in disturbing the possession in point of jurisdiction; and, 2dly, If it was, whether that court has rightly decided the question of title in transferring the possession to Mr. Cole, the asserted original owner.

The vessel was arrested at Gibraltar, under the authority of the Vice-Admiralty Court, in June, 1827; a libel was given in on the part of Mr. Cole, alleging a transfer to him by bill of sale from Mr. John Maclean, a merchant at Gibraltar, on or about the 23d of June, 1820; and that he, Cole, had not since sold, transferred, or otherwise parted with his interest. In proof of these averments a bill of sale is exhibited, and a copy of the certificate of the former register, bearing an indorsement made by the British consul on the 12th of July, 1820, at Malaga, certifying that it had been made to appear to him, by a bill of sale, that the vessel belonged to Mr. Cole. Two witnesses are examined; Horn, the master, in June, 1827, who speaks only to his appointment by Mr. Isnardy, and to the character of the vessel at that time; and Stokes, the broker, who prepared the bill of sale, and who speaks to that fact.

The bill of sale purports to transfer the vessel to Cole from Maclean for the sum of 7,500 hard dollars, and it is in the usual terms, but it has no date. It is said that this is a clerical error, and it may be so, as I perceive the alleged transfer in June, 1820, is admitted in the adverse plea. It is, however, an apparent defect; and I notice it rather, because there are passages in the evidence, to which I

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The John. -2 Hagg.

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[ \* 308 ] \* shall presently advert, that make it doubtful at what time the bill of sale was actually executed; and some of the arguments have been founded on the date of the transaction; it being maintained on one side, that there having been a previous sale by Maclean to Mr. Weeks of Malaga, in the beginning of June, 1820, and possession given to him, no power remained in Maclean to make the alleged transfer to Cole on the 23d of June, 1820; and, on the other side, it is said, that Cole having obtained a bill of sale from Maclean, no private agreement could give Weeks any right of property from which Isnardy's title could be derived. I shall state the evidence that relates to this doubt as to the date when I examine the correspondence.

On the part of Isnardy an allegation was admitted, denying the sale to Cole for a valuable consideration, and pleading that a colorable document in the nature of a transfer of the vessel was executed to Cole by Maclean in June, 1820; and that, with the full knowledge and consent of Cole, the vessel was transferred to various owners, and particularly to Mr. Mark, the British consul at Malaga; and by him to the appellant on the 23d of March, 1825; and that the vessel had been held ever since by the appellant, and employed as a Gibraltar vessel under the proper documents granted by the governor.

It is not necessary to examine, in the first instance, the title of a person in actual and *bonâ fide* ownership and possession of a vessel till it is impeached; and it is not asserted that Isnardy's title is otherwise defective, than as it may be superseded by Cole's anterior title.

Cole, therefore, must succeed by the strength of his own [ \* 309 ] title, and not \* by objections to the course of transfer to Isnardy; and I shall assume, for the present, that it is not necessary for me to examine more particularly that part of the case.

The witnesses, who have been examined by Isnardy, are persons well qualified to give information respecting the alleged transfer, though the court has to lament that their evidence, either owing to the manner of taking it, or to some other cause, is not so satisfactory as might be desired. These witnesses are, Cosens, the agent and former partner of Cole; Stokes, the notary; Sandeman, the confidential clerk of Maclean; Ferns, the clerk of Weeks; and Rixon, one of the original British owners of the vessel in 1819, and who was appointed master by Weeks.

Cosens says, " that he received the bill of sale from Weeks on the 13th of July, 1820; that it was made as the security for a debt due from Weeks to Cole, and also for the purpose of obtaining a British register; that Cole never attempted to take possession of the vessel, or otherwise acted as owner; but he adds, that was deferred till the

vessel should arrive in England, to which country it was repeatedly represented by Weeks that the vessel should go; he says, Cole did not receive the earnings of the vessel, or pay any of her expenses." Stokes says, "the bill of sale was prepared from instructions given to him by Maclean and Cole, and that it was executed about the 23d of June, 1820, and was then left with Gray & Co." It seems, therefore, not to have been transmitted to Cole, nor delivered to Cosens at that time. Sandeman says, "the transfer was made to Weeks, and the purchase-money paid by him; that possession was given to \* Weeks at Malaga, where the vessel was then lying; and [ \* 310 ] that, by Weeks's direction, a bill of sale was afterwards executed by Maclean to Cole." Ferns speaks to a similar effect. Rixon was appointed master of the vessel by Weeks, after the transfer to him in June, 1820; he received his wages from Weeks, and has still a demand for some part that remained unpaid; he navigated the vessel on two voyages to the Havana, as he says, under her former papers in the service of Weeks; the vessel was afterwards put under Spanish colors in 1821, when another colorable bill of sale was made by Maclean to a Spanish house, and by that house to Weeks; and the original English register was transmitted by Rixon to the custom-house in London, in order to procure its cancellation. I cannot understand how the vessel could have been so long navigated, as he describes, under her former papers without some fraud or abuse of the register acts;<sup>1</sup> but I shall not enter into that question. Rixon considered Weeks to be the owner, and had no communication with Cole.

This is the substance of the parol evidence; it describes the transfer to have been made only, at the utmost, as a security or mortgage for a debt. So far as I can judge from the correspondence annexed to Cosens's evidence, the debt from Weeks to Cole was not due in July, 1820; since, in his letter of that date, he speaks of balances, and remittances, as if the accounts were then clear; and it is not till the 28th of October of that year, that, in a letter to Cole, Weeks, after mentioning \* "heavy drafts he has made on his Lon- [ \* 311 ] don house," there follows this passage: "You have the brig John, so that we conceive you have full satisfaction." It does not appear how these observations were received by Cole; and it is a defect in the production of extracts from the correspondence that it is not accompanied by an averment that all letters, or parts of letters apply-

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<sup>1</sup> 26 Geo. III. c. 60; 34 Geo. III. c. 68, s. 22. These have been repealed by 6 Geo. IV. c. 110; 7 Geo. IV. c. 48.



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ing to the subject, are produced. Without such assurance the court cannot feel itself in possession of the whole evidence that may properly belong to this case.

There is another passage in Weeks's letter of the 12th of July relating to the bill of sale then sent to Cosens. It runs thus: "There is the bill of sale (for The John) from Mr. Maclean to Mr. Cole, which pray forward by some safe conveyance. The register has an indorsement of which we give you a copy; and now we wish to know what sort of alteration in her papers should be made, and how a new register is to be procured. A copy of the old register is to be in the bill of sale." These are strange directions to be given for prospective acts at that time, relating to a vessel which is supposed to have been actually transferred to Cole from Maclean, by bill of sale, on the 23d of June; and this is the first passage in the evidence, to which I before alluded, that throws a doubt on the real date of that instrument. The bill of sale, thus sent to Cosens, must have been a draft only, or direction for a bill of sale, as some things are specified as then to be done, and to be inserted in that instrument. And there is a passage in a letter of Cosens's, of the 14th of August, 1820, that still further confirms that

supposition. Cosens then writes: "Brig John, — there is [ \* 312 ] \* Mr. Maclean's answer, with the bill of sale." This is inconsistent with the supposition that the bill of sale had been executed on the 20th of June, or even with the account given by Cosens that he had received it in July; but it does accord very well with the account given by Mr. Sandeman, "that the transfer was first made to Weeks, and by his direction a bill of sale was afterwards made by Maclean to Cole."

In the correspondence of Cole, Cosens & Co., there are two other passages on which also some observation arises. In a letter of the 22d of September, 1820, Cole writes thus to Weeks: — "If the bill of sale is properly executed, we do not see any necessity for the vessel coming to England merely to obtain a new register; neither do we anticipate the least difficulty in this respect, if a loss occurs, and we have to recover of the underwriters." Cole here discourages the sending the vessel to England, which does not agree with the excuse made by Cosens for his delay in taking possession. And the observation goes further, as it implies an acquiescence and consent that the vessel should continue in the possession of Weeks; and there is no appearance of any remonstrance or declaration to the contrary. There is another passage to the same effect in a letter of the 27th of March, 1821, when the vessel had been put under Spanish colors, under the bill of sale executed by Maclean to a Spaniard, and from him to Weeks. It is a letter from Cosens to Weeks, in which he thus writes from

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The John. 2 Hagg.

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Gibraltar: "Manchego (namely, the Spanish name given to The John.) The wind is contrary for her, but we hope she will have a good voyage notwithstanding. We have paid for the \* fol- [ \* 313 ] lowing items of your debit." This implies a further acquiescence in the ostensible ownership of Weeks, after the vessel had assumed a Spanish character, and had sailed apparently from Gibraltar, where Cosens resided, on a voyage to the Spanish colonies. It was argued, in answer to the objection that Cole had never taken possession, that it did not appear that he had the opportunity, or that the vessel was not withheld from him by Weeks by fraud, or under an adverse title. But these passages refute that argument.

On this view of the evidence, it is impossible to deny that there is much obscurity hanging over this transaction, both as to its nature and character, and as to the time of its execution. It is at most but a conditional assignment for a debt, not reduced to possession, nor clothed with any one act of ownership; on the contrary, the ship remained in the hands of Weeks, from whom the asserted interest proceeded undoubtedly, if not the title. And it is by no means clear that Maclean had any right in the vessel by which he could make a legal transfer to Cole, after he had parted with the interest, and given possession of the vessel to Weeks, in the manner described by the witnesses. But it is said, that the bill of sale is absolute in its terms and effect, and that the title passed thereby to Cole, and has not been since divested; and cases have been cited to establish that position."<sup>1</sup> These cases are very different from the present in the main point. They decided for the title, according \* to the bill of sale and certi- [ \* 314 ] ficate of registry, in exclusion of other interests; but they all agree in this, that there was no visible ownership in any one else opposed to the asserted title under the bill of sale; and that is a material distinction. That circumstance is noticed in the terms of the judgment in *Curtis v. Perry*; and in *The Sisters*, the learned judge draws the same conclusion from the evidence. The case of *Dixon v. Ewart* has been principally relied on, as deciding that the transfer of a ship at sea vests the property in the vendee; liable only to be divested by the neglect of the vendor to make the indorsement on the certificate of registry within the ten days after the return of the ship into port. That *dictum* related to a sale of a vessel at sea in satisfaction of a debt, and to the fact of an intervening bankruptcy in the vendor before the return of the ship, and before the indorsement could be made

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<sup>1</sup> *Curtis v. Perry*, 6 Ves. 739; *Ex parte Houghton*, 17 Ves. 251; *Dixon v. Ewart*, 3 Merivale, 322; *The Sisters*, 5 Rob. 155.

on the register. However true and correct, therefore, the *dictum* might be with reference to those circumstances, it does not appear to me to furnish any authority that is applicable to this case. As there was no diversity of ownership appearing, the question arose between the assignees of the vendor and the purchaser, claiming under the same original title.

What, then, is the jurisdiction of the Admiralty Courts in such a case as the present? The principles of limitation are laid down by my predecessor very fully in two cases that have been cited;<sup>1</sup> and it will be more convenient to adopt his words than to multiply distinctions on this point. In *The Pitt*, Lord Stowell says, after [ \* 315 ] many other \* observations, "There may be incidental matters, such as repairs and other expenses, requiring the application of equitable principles which the court may not feel itself competent to administer; I may, therefore, lay it down as a rule for the conduct of this court, that it is only in simple cases which speak for themselves that it can act with effect; but in those which, being complex, require a long and minute investigation, it cannot proceed with safety."

Both those cases are much stronger than the present, and much clearer in the original title, being cases of vessels sold under distress abroad, and in which no doubt existed as to the original title; yet my predecessor declined to interfere. In a cause of conditional assignment I have myself done the same.<sup>2</sup>

The utmost that can be said of this title, under the most favorable view of the evidence, is, that it was a security for a debt, or conditional assignment, or mortgage of the vessel, not reduced to possession, though in absolute terms. I can have no doubt on the point of jurisdiction, that this is not a case in which this court would have proceeded to disturb the possession. But it is said, although this court might not have entertained a suit of this kind, brought before it in its original jurisdiction, it will act with greater latitude and liberality in judging of the acts of the inferior court, and will be desirous to decide the case on its merits rather than on a point of form. The court certainly would do so on mere form; but I cannot consider the power [ \* 316 ] of the court to disturb \* the possession to be mere form, but rather a very substantial part of the question before me; and a loose determination on my part on this point could not fail to increase proceedings of the same kind in the widely-extended Vice-

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<sup>1</sup> *The Warrior*, 2 Dod. 288; *The Pitt*, vol. i. p. 242.

<sup>2</sup> *The Fruit Preserver*, *suprà*, 181.

Admiralty Courts of this country in distant parts of the world. The mischief of encouraging such a practice would be much greater than any inconvenience that might attend the exceeding of jurisdiction with which this court might be chargeable in an original case, which might be either sanctioned or corrected by the superior courts in a short time. But in cases arising in distant settlements much time must elapse, and great inconvenience must be occasioned to the party, before such an error can be set right by appeal.

For these reasons, I feel myself bound to decide this case distinctly on the question, of jurisdiction, saying, at the same time, that if I were disposed to go further, and decide on the merits, I do not see any conclusion to which I should be likely to arrive, that would support the sentence. I can safely say that I could not decide in favor of Mr. Cole's title, such as it appears on these proceedings; and it would require a stronger power of construction than this court possesses, and the means of obtaining much further information than I can derive from this evidence, to form a more positive opinion on the bare title of property which is said to exist in Mr. Cole under this bill of sale. I must, therefore, reverse the sentence, and pronounce for the restitution of the vessel to the former possessor. And, as he has been dispossessed of his vessel, which has been in the hands of Mr. Cole, as I am informed, under the sentence, \*for two [ \*317 ] or three years, I should not do full justice if I did not pronounce also for compensation, in the nature of demurrage, and refer the amount to the registrar and merchants. I decree this not as vindictive damages, but as virtually a part of the interest in dispute. I do not condemn the party in costs, as it is not usual in reversing a sentence, unless under special circumstances. I am willing to presume that every thing has been done from proper motives; but, as I think the judgment of the court below is founded on erroneous principles, or on incorrect information, it is my duty to reverse it, and award to the party such relief as may amount to an equitable compensation for the injury which he has sustained.

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The Zepherina. 2 Hagg.

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ZEPHERINA,<sup>1</sup> Lima.

March 2, 1830.

In joint captures, only the actual force present shares in the prize. Therefore, when a tender of one ship was joint captor with another ship, the prize was shared proportionably between the capturing ship and the tender; but the tender's share, under the Order in Council, 30th of June, 1827, is distributable among the whole of the ship's company.

THIS was a slave-trader captured on the 14th of September, 1828, after a joint chase by H. M. S. Primrose and H. M. armed brig Black Joke, attached to and acting as a tender to H. M. S. Sybille, W. A. Collier, commander, the commodore of the squadron on the coast of Africa, and officered and manned from The Sybille. On a monition having been served calling upon the commander, officers, and crew of The Primrose, to show cause why The Sybille should not share conjointly with The Primrose and The Black Joke, the interest of The Sybille was denied, and was pleaded in an allegation detail-  
 [ \*318 ] ing \* the chase and capture, as set forth in the logs of The Primrose and Black Joke.<sup>2</sup>

The *King's Advocate* and *Phillimore*, for The Primrose.

*Dodson* and *Addams*, for The Sybille.

JUDGMENT.

SIR C. ROBINSON. This is a claim of joint capture on the part of H. M. S. The Sybille, to share in the proceeds of the captured vessel and in the bounty granted for slaves, in virtue of the coöperation of the hired armed tender, The Black Joke, which was a joint chaser, and, in some sense, as maintained in the argument, an actual captor. The connection between The Sybille and the tender is established by the authority of the admiralty, and, therefore, no question arises on that point; and the interest of the tender, or of The Sybille, in the proportion of the tender's force, is not denied.

The whole question depends on the construction of the order in council of the 30th of June, 1827, for the distribution of such captures, which directs "that all rewards for arrests and seizures made

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<sup>1</sup> [For note as to joint capture, see The Nordstern, 1 Acton, 128.]

<sup>2</sup> The log of The Black Joke was, upon the allegation coming on for debate, opposed as inadmissible, and rejected by the court.

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*The Zepherina.* 2 Hagg.

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by tenders employed by the order of the Lord High Admiral, or of the commissioners for executing that office for the time being, or by boats or officers belonging to and detached from his Majesty's ships and vessels, are to be shared by the officers and men of the ship or vessel to which such boats or officers belong, in the same manner as if the seizure was made by the said ship or vessel." It is

\* said that these terms are absolute, and entitle *The Sybille* [\* 319] to share as if the capture had been made by that ship herself; and much stress is laid on the averment that *The Black Joke* is to be considered as an actual captor, and not merely as a constructive joint captor, from being only in sight. In the case of *The Aviso*,<sup>1</sup> my predecessor doubted whether the mere constructive service of being in sight alone, would be applicable to the capture of slave ships under the conventions with foreign powers; and, therefore, all claims of joint capture in this class of cases must partake of the merit of actual assistance and of actual capture, so far as that term can be applied to any other than the immediate taker. But there is no question of that kind raised in this case, as the services are admitted to be those of efficient coöperation in the chase and in the capture. But, as it will be convenient to clear away all ambiguity in the use of the terms, I will briefly refer to the facts of the case.

The prize was a Brazilian slave ship, liable to capture under the convention with Brazil, and has been condemned at Sierra Leone by the British and Brazilian mixed commission, under the treaty. She had been discovered by *The Primrose* about nine o'clock in the morning, and had been chased throughout the day; but as the chase was to windward, it is said *The Primrose* had not gained much on her, and would probably not have come up with her before night. About three o'clock in the afternoon, *The Black Joke* came in sight from another quarter. She joined in the chase, and assisted materially in causing the prize \* to change her course in the [\* 320] direction of *The Primrose*; and about six in the evening the three vessels were within half a mile of each other, when *The Primrose* fired, and the prize struck or surrendered to *The Primrose*. Both ships came up to the prize, and some of the crew of *The Black Joke* were put on board, as part of the prize crew, to conduct her to Sierra Leone; and there is no doubt that the tender was actually contributing to the capture, and, in that sense, an actual joint captor.

But the counsel for *The Sybille* attribute to this case, under the term "actual captor," all the consequences that would attend a sole

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<sup>1</sup> *Supra*, p. 31.

and exclusive capture by a tender attached to one of his Majesty's ships. They admit there might be a difference in cases of mere constructive assistance; but they contend that the words of the order are imperative in respect to seizures made by tenders, and that this seizure was so made by *The Black Joke*. But, in order to see in what sense the terms relied upon are to be interpreted, it may be proper to inquire what are the principles of law applicable to such cases, independent of the order? It has, I believe, been the invariable practice of the prize courts to hold joint captors entitled to share according to their respective forces present at the capture; and where efficient services have been rendered by tenders not attached, as in the case of *The Melomane*,<sup>1</sup> or by other non-commissioned vessels, the condemnation of their proportion, so calculated, has passed to the admiralty; but no greater proportion has ever so passed, in [ \*321 ] cases of joint capture, than according \*to the amount of force present, and so contributing to the capture. That has been the invariable rule of practice, and is agreeable to the principles of natural equity and justice. If that is admitted, and I have not heard it contradicted, it will afford a rule of construction to the order, if it is ambiguous or obscure; and it will be my duty not to depart from so equitable a principle, unless constrained by terms that are perfectly clear and unequivocal.

The clause referred to appears first in that part of the order which relates to revenue seizures, in which the incidents of joint capture are not generally contemplated. It is afterwards applied to slave cases by general reference; and there may be something, perhaps, in this consideration, that points rather to a limited interpretation of its terms. That clause directs, "that seizures made by tenders shall be shared with the ship to which the tender belongs, as if the ship had made the capture." "Seizures made by tenders" may be either such as are made by tenders alone, or in the proportion attributed to tenders in cases of joint capture. It is not necessary to go further to put an adequate construction on the terms of the order. In the former class of cases, it may be truly said, in the words of Lord Stowell, "When a ship takes by her boats or tender, she does all she could have done if present." But in joint capture the consequence may not be the same, as the contest may be more severe and dangerous to the joint captor than it would have been if the ship herself had been present. When it is said, therefore, that by the terms of the order the ship is to be considered as present, it should be remembered

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<sup>1</sup> 5 Rob. 41.

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The General Palmer. 2 Hagg.

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that cannot \*be, to the effect of rendering equal service ; [ \* 322 ] and it would be unjust to the joint captor to adopt that construction for the purpose of giving to another party a share in the prize, disproportioned to the force actually contributing to the capture. But in applying the order only to such proportions of seizures as may be attributed to the assistance rendered by tenders in cases of joint capture, no injustice will be done. The order is, indeed, in this respect, only declaratory of the general principle of law, and may, therefore, be more safely interpreted by it. If the order could be applied more absolutely and without qualification, the same argument might be used to entitle the whole ship's crew, even in cases of a wilful departure of the ship from the scene of action, in pursuit of some other object, which would be unreasonable, and contrary to all principle.

Something has been said of the hardship sustained by the tender, in having her small proportion distributed with the whole crew ; but that I conceive to have been the state of the old law ; and there is, I presume, some reciprocity between parties so detached, which may further remove this objection. On the whole, I am clearly of opinion that this allegation will not entitle *The Sybille* to share in the manner pleaded, and, therefore, it will be of no use to admit it to proof.

*Allegation rejected.*

On the 12th of November, an application that the expenses, incurred on behalf of *The Sybille*, should be paid out of the bounties, was opposed and rejected.

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\* GENERAL PALMER, Thomas.

[ \* 323 ]

May 22, 1830.

The Court, on appeal from an award of salvage, reversed the award, considering the amount excessive, as the service had not been attended by much labor or danger ; but allowed the salvors their costs.

This was an appeal from an award of five commissioners of the cinque ports, in a case of salvage rendered off Margate to a valuable East India homeward-bound ship, upwards of 500 tons burden. The award detailed the circumstances, from which it did not appear that there had been any material disputes before the commissioners respecting the facts, or that any proofs had been submitted to them



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The General Palmer. 2 Hagg.

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beyond the respective statements of the salvors and of the captain; but, on the appeal, an act on petition supported by affidavits was introduced.<sup>1</sup>

It appeared from the commissioners' award, that the ship had anchored off Margate on the 22d of November, 1829; on the night of that day the weather became very squally, and the wind blew a hurricane during the whole of the next day; and on the morning of the 24th, the ship parted from her small bower anchor. The master hoisted a signal for an anchor and cable, which was interpreted to be a signal of distress; and two luggers, *The Liberty* and *King George*, of Margate, put off to her assistance. Six men from *The*

*Liberty* went on board, and *The King George* returned for [ \* 324 ] an anchor and \*chain cable. The pilot, who had come on

board in *The Downs*, then advised that the ship should be run on the mud in Whitstable Bay, about eighteen miles above Margate; and the men of *The Liberty* undertook that charge, and performed it successfully. After lying there in safety for two days, the ship was assisted by a steamboat and removed to London without damage. *The King George*, being unable to carry out the anchor and cable, from the weight thereof and the state of the weather, employed another lugger to take part of the cable, and they, at great risk, proceeded together to the ship; and in the afternoon of the same day delivered the anchor and cable on board. The ship and cargo were valued at 30,000*l.*; the salvors were in number fifty-one, and the commissioners awarded 1,000*l.* generally to all the salvors. The owners appealed, and made a tender of 500*l.*

*The King's Advocate* and *Phillimore* in support of the appeal.

*Dodson* and *Addams*, for the salvors.

#### JUDGMENT.

SIR C. ROBINSON, — after recapitulating the above facts, — observed, that the award was faulty in not having discriminated more particularly between the services of the different parties. One lugger never

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<sup>1</sup> On an appeal from an award of salvage, new matter should not be introduced without special leave from the court.

Upon the opening of the case the court observed, that it was improper to treat an appeal of this nature as open to the introduction of fresh matter by act on petition, and affidavits *de novo*; that it was a practice which ought to be discouraged, and should not again be resorted to without an application to the court.

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The Adah. 2 Hagg.

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approached the ship before she was safe on shore, and then only for the purpose of helping to bring out the chain cable. The King George could not be said to have done much more, though that lugger had gone off to the ship on the signal made by the master; yet all three boats and their crews, amounting to fifty-one men, were treated on the same footing as principal \* salvors, as in [ \* 325 ] a case of common service, by which the award was necessarily increased. The services of The Liberty were important, and, to a certain extent, highly meritorious. To steer a large and valuable ship, full of cargo and passengers, for a considerable distance, for the purpose of laying her on shore, was a service of responsibility which required experience, firmness of mind, and great promptitude and vigilance to execute it successfully. So far the principal salvors were entitled to be considered as highly meritorious. Still it was a limited service, not attended by much labor or danger. If the case had been originally before the court, it would not have given more than the sum tendered; but would have made a different distribution of the sum. As this had not been done below, and as the case had hitherto proceeded as a common interest, this court would not now disturb the award in that respect. But, thinking the tender sufficient, the court should reverse the amount of the award and give 500*l.*, with an additional 100*l.* to The Liberty for the services she had rendered, with the expenses incurred both in this court and before the commissioners.

Award reversed.

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\* AD<sup>A</sup>H, Martin.

[ \* 326 ]

June 16, 1830.

A ship arriving at the entrance of the West India docks too late to be received into the docks that tide, is not liable, under the table of remuneration to cinque port pilots, annexed to 6 Geo. IV. c. 125, to an extra charge of pilotage for "docking" on the next tide.

THIS was a case of pilotage service. This vessel, drawing eleven feet of water, and of 147 tons, was conducted by a cinque port pilot from Dungeness to London; and on her arrival at Blackwall, owing to the state of the tide, she could not be received within the West India docks, her place of destination, until the following day; she was accordingly moored at the entrance of the docks till the next day at noon, when she entered the docks. The pilot claimed 15*s.* in addition to his principal wages, as an usual remuneration for the delay

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The Adah. 2 Hagg.

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that had intervened between the ship's arrival and her final mooring in the docks.<sup>1</sup>

*Phillimore*, for the pilot.

*Dodson*, *contra*.

[ \* 327 ] JUDGMENT.

SIR C. ROBINSON. This is a claim for pilot services, in which neither the services nor the principal wages are disputed. But a question is raised respecting a demand of 15s. for docking the vessel on the day after her arrival, as the tide was too far spent, when she reached Blackwall, to allow her then to go into dock; she was therefore moored at the entrance of the docks, and taken in the next day at two o'clock. It may be presumed, from the smallness of the immediate interest in litigation, that the principal and real object of the parties is to obtain a construction of the 6 Geo. IV. c. 125, which regulates the pilot service, but does not provide specifically for a case like the present. The sum of 15s. is allowed in table (A.)<sup>2</sup>

[ \* 328 ] annexed to the act, for Trinity House pilots, for "removing a vessel "from her moorings to a dry or wet dock;" but there is no mention of dock or moorings in table (B) for cinque port

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<sup>1</sup> When the pilot quitted the vessel, the master gave him an order upon the owner's agent for 12l. 4s. 9d., his regular wages, and for a further sum of 15s. for "docking."

The 6 Geo. IV. c. 125, (pilotage act,) s. 25, directs: "And be it further enacted, that from and after the passing of this act, the respective rates or prices hereinafter enumerated in the tables marked (A and B) respectively in the schedule marked (A) to this act annexed, shall and may be lawfully demanded and received by any pilot licensed or to be licensed by the corporation of the Trinity House or by the lord warden of the cinque ports and constable of Dover Castle for the time being, or his lieutenant for the time being respectively, for the piloting or conducting of any ship or vessel from place to place, as expressed in the said tables respectively; that is to say the respective rates or prices enumerated in the said table marked (A) shall and may be demanded and received by any pilot licensed or to be licensed by the said corporation, and the respective rates or prices enumerated in the said table marked (B,) shall and may be demanded and received by any pilot licensed or to be licensed by the said lord warden of the cinque ports and constable of Dover Castle for the time being, or his lieutenant for the time being; and no greater or less rates or prices, or other reward or emolument, shall under any pretence whatever be demanded, solicited, received, paid, or offered, than such rates or prices, on pain of forfeiting 10l. for every such offence, as well by the person demanding, soliciting, or receiving, as also by the person paying or offering such greater or less rate or price, reward, or emolument."

Section 26 provides, that the rates may be varied by the Trinity House and lord warden of the cinque ports respectively, with consent of the privy council.

<sup>2</sup> In table (A) there were also different rates for pilotage from "Long Reach to Woolwich or Blackwall; from Long Reach to moorings or London Docks." But in table (B) the rates were general, as from "The Downs to Blackwall or London."

pilots. I am inclined, however, to think, that these two tables, supplied from the two authorities of the Trinity House and the corporation of the Cinque Port pilots, as relating to the same subject, ought to be considered together, and interpreted by the same rule, so far as may be consistent with their objects; and, therefore, if I should think that any extra remuneration is due, I shall have no difficulty in adopting the allowance of 15s. as set forth in the Trinity House table. It is my intention, in the remarks which I shall have to make, to compare the two tables, and use them for mutual elucidation. As neither the act of parliament nor either of the tables in schedule (A) specifies this particular service, affidavits have been introduced to support the construction for which the parties severally contend. On the part of the pilot there is his own affidavit, and the affidavit of another Cinque Port pilot; and they swear, that whenever a ship has been docked not on the day of arrival, but on a subsequent day, an additional remuneration of 15s. has been received. On the other side there are the affidavits of Messrs. Geddes, the agents of the ship, who swear that they have never paid an additional remuneration, unless the vessel has been detained two or more days. On one side, therefore, docking on the day of arrival is admitted to be the duty of the pilot; and on the other, docking after the second day is admitted to entitle him to compensation. That leaves this particular question undetermined; and the only disputed point respects the docking on \*the next day, or the next working tide, as it may be [ \* 329 ] called, when the vessel cannot go in on the day of arrival.

It is inconvenient, undoubtedly, that such a question should have remained so long subject to such contradictory representations; and, looking to the powers of the two corporations to make additional regulations, I thought the question might have received an interpretation from some authority exercised by them; and, under that impression, the court gave leave to bring in further information to that effect. Nothing, however, of that kind has been introduced, and therefore the question must be decided on the statute and the schedules annexed, with such elucidation only as may be deduced from general principles of law.

The 6 Geo. IV. c. 125, is founded on a previous statute, 52 Geo. III. c. 39, to which the schedule (B) was annexed *verbatim* as it now stands; from which I infer that it was probably a schedule in use even before that time, and not framed with reference to the changes introduced by the erection of docks.<sup>1</sup> The Cinque Port table makes

<sup>1</sup> The West India Dock Act is the 39 Geo. III. c. 69; the London Dock Act, the 39 Geo. III. c. 47.

no mention of docks or moorings; it assigns rates for pilotage to different stations, and sometimes at considerable intervals; it includes Blackwall and London in the same rate; whereas the Trinity House schedule (A) joins Blackwall and Woolwich, and gives a higher rate for "moorings or London Docks." In that schedule, therefore, the

London Docks are assimilated to moorings, that is, I pre-  
[ \* 330 ] sume, \*the final moorings, which are usually considered as the termination of the voyage, and the completion of pilot service.

From this specification in the Trinity House schedule, I infer that docking is to be considered as equivalent to ordinary moorings. That principle agrees with the obligation to dock on the day of arrival, as admitted by the pilots, and is conformable to the general law. And I am inclined to apply the same test to this service under the Cinque Port schedule (B.) What, then, has been done that may be deemed equivalent to placing this vessel in dock or at her general moorings?

By the London Dock Act, it was not obligatory on all vessels to go into dock,—some might go to general moorings; and I understand the schedule in that act to be so fixed for docking when required, or for bringing the vessel to her proper moorings, when she was not intended to go into dock. In the West India Dock Act, all West India vessels are required to go into the dock. The moorings at the entrance of those docks are appropriated to West India vessels; and vessels going out are not allowed to remain at those moorings longer than twenty-four hours. This vessel was moored there avowedly with the intention of going in at the next tide, not being able to enter on the day of her arrival solely in consequence of the state of the tide. The difficulty which I feel, therefore, is to say that this mooring could be considered as equivalent to the common mooring of ships at their final stations. If it is less than this, how can I add, in this case, to the rate fixed for the duty of bringing the vessel to her proper berth? It may happen that vessels may be prevented

[ \* 331 ] from \*going into dock from various circumstances. The dock may not be able to receive them, or the owner may have some reason for delay. In such a case, it would be equitable to hold that the navigation of a vessel had been completed, so far as the duty of the pilot was concerned, upon arriving at the docks; and extra allowance might then become due, as is admitted by the agents. But when the docking is prevented on the day of arrival by the state of the tide only, in what does such delay differ from any other cause of delay occurring in any other part of the voyage up the river? It is not unworthy of remark, as observed in argument, that it would be in the power of pilots to protract the voyage according to the state

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The Adah. 2 Hagg.

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of the tide, and so furnish a pretence for claiming the extra allowance in every instance. It would be a wholesome interpretation of their duty, therefore, as well as a reasonable construction of the act of parliament, to hold that the duty of docking, as admitted to attach on the day of arrival, should extend to the next working tide after their arrival. Such an exposition of the act would be consistent with general principles, and harmonize very much with the representations given in the affidavits on both sides. It would confirm the obligation of docking at a proper and seasonable time, as admitted by the pilots; and it would at the same time give them the benefit of extra allowance for delays occasioned by incidents not connected with the navigation, as admitted in the affidavits of the agents. The incidents of navigation must, I conceive, all come within the compass of twenty-four hours after arrival; that is the precise period which the owners contend is included in the pilot service. \* The forty- [ \* 332 ] second section imposes on pilots the obligation, under forfeiture of wages, of not leaving ships before they arrive at their place of destination; and, though this may mean primarily the general port of destination, I think it may be applied also to elucidate their duty in placing the ship at her proper station. The twenty-fifth section forbids all persons, under a penalty of 10*l.*, from giving or receiving more than the rate provided by the act; and this suggests to the court the duty of not increasing the rates of pilotage, from mere liberality of construction, in favor of a meritorious class of persons; and reminds it, that if more was intended to be given by the schedules, the deficiency may be supplied by the corporation boards, and that it will be done more safely in that way than by the authority of the court. This consideration furnishes an answer also to the claim, as attempted to be sustained, on the ground that the master had reported it to the agent as due to the pilot. Upon this part of the case, it has been said that the master was a stranger to the port of London, and ignorant of the statute. He might be so; but, whether he was or not, he could not authorize, on the part of the owners, the payment of more than the statute allows, without incurring the penalty of that statute. His consent, therefore, does not advance the case, but still leaves it to be decided by the proper construction of the act.

Looking to the act of parliament, as it is explained in this schedule, and elucidated by the general principles of law, I do not feel myself justified in pronouncing for the demand. On the contrary, I think the service performed on the next day was included in the general duty of pilot as an incident \* of navigation; and, [ \* 333 ] therefore, without prejudice to the claims of pilots in other

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The City of Edinburgh. 2 Hagg.

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cases, if they can support those claims by better authority derived from the corporations regulations, I pronounce for the tender of wages as made, without the additional 15s. for docking.

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CITY OF EDINBURGH, Fraser.

January 21, 1831.

Where pilots had not made a fair trial to get off to a vessel in distress for two days, when there might be danger and difficulty, and went off on the third, when there was no danger and when the weather was moderate and the wind fair for the harbor, the court, assisted by Trinity Masters, pronounced that the service amounted only to pilotage, and not to salvage; and it sustained the tender, but directed the owners to pay the costs.

THIS was a claim of salvage, on the part of Edmund Dew and twenty-four boatmen of the port of Blakeney, in the county of Norfolk, for services alleged to have been rendered to the steam-packet The City of Edinburgh, on the 13th, 14th, and 15th of January, 1830. The value of the vessel and cargo was 33,000*l.*, and bail was originally given in 1,500*l.* A tender of 15*l.* was made on the part of the owners, who imputed to the men a wilful refusal to come off to the assistance of the vessel during the 13th and 14th, in order that the distress might be increased, and their services enhanced. The owners further alleged, that the service rendered on the 15th, after the storm had abated, and the vessel was nearly under weigh, did not exceed that of simple pilotage, in bringing the vessel into harbor.

The court was attended by Captain Chapman and Captain Bradford, two of the elder brethren of the Trinity House.

*Addams*, for the salvors.

The *King's Advocate* and *Phillimore*, *contra*.

[ \*334 ] \* The COURT addressed the gentlemen of the Trinity House, and observed — That the case, *prima facie*, exhibited this peculiar circumstance: it appeared from the salvors' own statement that the vessel had been lying in sight off Blakeney, about three miles from the harbor, during two days, with a signal of distress flying, and yet that no boat went to her assistance till the 15th — a fact hardly ever before appearing in the annals of that adventurous body of men, the coast pilots and boatmen of this country. This

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The City of Edinburgh. 2 Hagg.

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alone was sufficient to raise a doubt, whether all had been done that ought to have been done to raise a claim of salvage, as promptitude was a very principal ingredient in such services. The acts done on the 15th were evidently in the character of pilots, because the weather was then moderate, and a Wells boat had arrived first; but one of the Blakeney boats claimed a right to supersede that boat under a local pilot act.<sup>1</sup> It was pleaded, also, by the owners, that the master declared at the time that he only wanted a pilot for Blakeney, and would not even take one unless he was assured that there were thirteen feet of water on the bar, as he would otherwise go to the Humber. This statement was supported by the affidavits of some of the passengers on board, and it was not counterpleaded nor contradicted. Dew even admits that when he refused the offer of 10*l.* as pilot, he required only that the other boatmen, his companions, should be remunerated.

\* The immediate service on the 15th was therefore principally of the nature of pilotage; but it was contended that they had first signalled the master to go back on his attempt to enter the harbor on the 13th; that the men had continued on the watch for two nights, and had been prevented from going off only by the violence of the storm and the extreme danger of such an attempt; that all these efforts, therefore, and the service afterwards rendered on the 15th, were to be considered as a continued and combined salvage service. On the other side it was alleged, that the men had delayed their assistance when it was wanted, saying that it was not worth while to go off till a signal of distress was hoisted; and that the claimants had actually prevented, by force, one boat from going off to assist. That this last averment was not so distinctly pleaded and proved as it ought to have been; but the representation on the part of the owner was sufficiently supported by the ostensible circumstances of the case, to render it a question of very great importance in this class of cases, to establish how such conduct ought to be viewed by the court. There were contradictory affidavits as to the possibility of going off; the men asserted that the boats did go off on the first practicable opportunity, and that they could not have gone before without almost certain destruction. The court was glad, therefore, to be assisted in such a case by gentlemen conversant with the navi-

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<sup>1</sup> An action for salvage was also entered against The City of Edinburgh on the part of twelve men of the port of Wells; but the court held that their claim did not exceed an ordinary pilot service. It therefore pronounced for 50*l.*, the sum tendered, and costs.



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The City of Edinburgh. 2 Hagg.

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gation of the coast, whose experience would enable them to appreciate duly every circumstance that might afford a test of the truth between such opposite statements.

[ \* 336 ] The court was disposed to adopt the issue \* suggested in the argument for the salvors, namely, whether they did go off at the first opportunity that could be fairly considered as practicable; and it would therefore propose to the gentlemen by whom the court was assisted, these two questions; 1st, Whether, in the state of wind and weather on the 13th and 14th, it was in the power of Dew and his associates to have gone off to the steam-vessel during the days of the 13th and 14th, so as to have rendered assistance without extreme danger to themselves? 2dly, Whether the wind and weather on the 15th were such as to expose them to so great risk and danger as should increase the ordinary rate of pilotage?

The *Trinity Masters* answered,— that although there might be difficulty and danger in going off on the 13th and 14th, yet it appeared to them that there had been a total want of exertion, and no fair trial made to go off; and that it was the duty of pilots always to make an attempt. On the second point, they were of opinion, that there was no danger whatever on the 15th, as the weather was moderate, and the wind fair for the harbor; and that the services performed were those of pilotage only.

The COURT concurred in this opinion, and pronounced for the tender, on the ground that the boatmen had not established a claim to salvage.

On the subject of the expenses, the court said that they were usually allowed; and though it could not, in this instance, but condemn the motives under which it must be presumed the boatmen [ \* 337 ] \* neglected to go off, yet that charge, and especially the more criminal<sup>1</sup> constraint exercised on the boat's crew who were attempting to go off to the assistance of the ship, was not brought forward so distinctly as it ought to have been. The master and owners made no complaint to the magistrates of Blakeney, as they might

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<sup>1</sup> At the admiralty sessions, Old Bailey, 21st of January, 1822, John Stebbens and others were indicted for a conspiracy to prevent certain persons, who were in a life-boat, from rendering assistance to the brig *Westmoreland*, (which had struck upon a sand,) in order to obtain a salvage for themselves, and to deprive the life-boat's crew of a share — and were convicted.

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The *Jane*. 2 Hagg.

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have done, when that fact might have been more easily and effectually investigated on the spot. The tender for pilotage was made without any charge of misconduct; and it was not till the cause was far in progress in this court, that the charge was introduced into the act on petition. Such a course of proceeding might be thought to throw some doubt or ambiguity over the fact; or, if little doubt existed, it placed the facts in such a situation as did not induce the court to exercise extreme severity, in laying on the salvors expenses that would very far exceed the remuneration which they have obtained. The court, therefore, directed the owner to pay the expenses.

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\* *JANE*, Hudson.

[ \* 338 ]

March 2, 1831.

Where the master of a whaler, and a boat's crew of five men had gone, at the imminent peril of their lives, to assist a vessel at sea dismasted, with the water making a breach over her; when they assisted in rigging a jury-mast, and afterwards towed the vessel during six days to Plymouth, the court awarded, out of 7,000*l.*, 1,200*l.*, namely, 700*l.* to the owners for demurrage, repairs, risks, and all expenses; 200*l.* to the master, and 20*l.* to each boatman, and the rest of the crew to share the remainder according to their interest in the voyage.

THIS was a case of salvage rendered to an homeward-bound West Indiaman, *The Jane*, in December, 1830, occasioning the detention of the salving ship, a South Sea whaler, which accompanied the vessel to England, and incurred a demurrage of three weeks, and other considerable expenses. *The Jane* was 250 tons, and *The Rover* 400 tons burden; and thirty-three men. The agreed value of *The Jane* and her cargo was 7,000*l.* The owners had tendered 500*l.*, with all costs, as well as the expenses of *The Rover's* repairs.

*The King's Advocate* and *Addams* for the salvors.

*Dodson* and *Matcham*, *contra*.

#### JUDGMENT.

SIR C. ROBINSON. This is a claim of salvage, founded on very meritorious services which are admitted on all sides, and therefore the court has comparatively an easy duty to perform; it has only to fix and establish the degree of merit, and the amount of reward consequent thereon, from evidence which is in some respects contradic-

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The Jane. 2 Hagg.

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tory, but differing more in words and intention than in reality and substance.

It appears that The Jane was returning from Berbice with a cargo of West India produce, and had encountered violent gales on the 6th of December, which had dismasted her, broken in her bul-  
[ \* 339 ] works, and done other considerable damage. \*She had put up a trysail, or spread some canvas, by which she had continued on her voyage till the 7th of December, when a sea broke it away, and reduced her to a very helpless state. Three or four men were disabled from illness, and the remaining crew, which consisted altogether of eleven persons, very much fatigued and dispirited. On the 8th of December the master and crew of The Rover, an outward bound South Sea whaler, came in sight; and the account given by Chambers, the master of that vessel, is to this effect. He says, on first seeing the vessel at the distance of about three miles, dismasted, with some of her crew on the rigging making signals, and others at the pump, he thought the vessel was water-logged; he does not say afterwards that she was actually so, but that such was the impression which her first appearance made on his mind; that the sea was running tremendously high, with a very heavy gale; and it seems to have been a very fortunate circumstance that The Rover was of that class of vessels that are particularly qualified to contend with rough and tempestuous seas, from their employment in the whale fishery. The master further says, he asked his men whether they should go to the ship, and proposed that he would go himself if others would accompany him. The crew consented, and four or five men volunteered to go with him in the boat; and so prepared were they to encounter danger, that, he says, they put off their heavy clothing, and stripped themselves to their shirts and trowsers, that they might have a better chance of saving themselves by swimming, if the boat should be swamped. They rowed to windward about three  
[ \* 340 ] quarters of a mile, and \*succeeded with great difficulty in reaching the vessel. Chambers boarded the vessel at the stern, the boat not being able to approach her sides; the water was making a clear breach over the ship; and the master asked Chambers how long he should stay in her, and whether he should take his crew out immediately, as it had been observed amongst them that the weather threatened another gale. A similar conversation passed also some time afterwards, when Chambers agreed to stay by the ship, and take her in tow when the weather should become more moderate. In the mean time the crew of The Jane proceeded, under his advice, and with his assistance, to put up something of a jury-mast, with which the vessel was enabled to sail at the rate of two knots an hour.

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The Jane. 2 Hagg.

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He says the master thanked him for coming on board ; that he considered him as his deliverer ; and that he thought he was a madman when he first saw him lowering his boat. This is confirmed by the surgeon, and by the Plymouth pilot, to whom Hudson made the same declaration. But when the master comes to make his affidavit in this cause so late as the 17th of February last, when the crew of The Rover were gone away, he denies this expression, and many of the circumstances described by the master of The Rover, appearing evidently to be actuated by a desire to reduce the merits of the salvors, for the purpose of lessening the claim of salvage against his owners. I am constrained to put this construction on his motives for giving an account so different from what he had before said in the presence of other witnesses. He denies that he had a signal of distress flying, and that the sea was making a breach over the ship. He says, on \*perceiving The Rover, who had her colors flying, [ \* 341 ] he did the same to show his national character, and that he only beckoned the salvors to come near that he might inquire the longitude, and speak to the persons on board ; that when Chambers asked with his trumpet whether he should come on board, he answered " No," distinctly, three times ; though the surgeon says, he declared to him that when he saw the danger which the boat was in when she had got half way, he was sorry that he had beckoned to them, as he was much alarmed for their safety. He denies also that he had any intention of leaving his ship, or that he asked the question ascribed to him, as intimating a wish to be taken out ; on the contrary, he says Chambers proposed that measure to him, and that he discouraged it, saying, " his ship was not in a condition that rendered it necessary, and that with assistance he should be able to reach a port ; " but he admits, that about noon, seeing the weather more threatening, he asked Chambers " what he would do with the crew, if he should be obliged to leave his ship, and where he would land them ; and Chambers replied, " at Madeira ; " and he also admits, that it was ultimately agreed that The Rover should stay by The Jane, and take her in tow. Now, this is the only controverted part of the case. What passed afterwards was matter of fact. Chambers returned to his ship ; the vessels sailed together during the night, and the next morning the weather had become more moderate ; ropes were passed to The Jane, and she was taken in tow, and so brought first to the neighborhood of Brest, and afterwards to Plymouth, where they arrived on the 14th of December, The Jane having \*been so conducted [ \* 342 ] to place of safety from W. longitude 10°, N. latitude 47°, where the salvors first met with her.

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The Jane. 2 Hagg.

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In weighing these contradictory statements, it will be proper to consider what agrees best with the facts of the case, as they may be collected from the situation of the parties, and from sources liable to no suspicion. When the master of The Jane swears that he answered "No," distinctly, three times, and that he did not wish the salvors to go out of their course, I do not believe him, as such an assertion is inconsistent with the subsequent conversations and agreement, which he admits. He had no right to draw them out of their course for such an insignificant purpose as that which he assigns, and it is not probable that he should have attempted it. He says, the sea was not tremendous, though it was high; and that it did not blow a heavy gale. These are differences of words, to which it is scarcely necessary to advert. When he admits that he only expected to be able to reach a port with assistance, and describes afterwards the agreement about towing as soon as the weather should become moderate, he does in substance admit all that the salvors have said. When he swears afterwards that his ship would not have been lost if The Rover had not come up; that he could have raised a jury-mast, and in all probability reached Brest or Plymouth in safety without assistance, it is in direct opposition to his own acts, as described in the former parts of his evidence. If he had any reasonable hope of reaching Brest or Plymouth, on receiving only such assistance as The Rover might have afforded in [ \*343 ] passing, in a few hours, it was a duty to himself, \*and to all parties, to have done so, and not to have brought a valuable ship many hundred miles out of her course, unnecessarily, in his service. I think, therefore, that he has sworn at least very disingenuously, and I place very little reliance on any contradiction resting solely on his evidence.

Without entering into further particulars, I have stated enough to warrant the conclusion, that The Jane was in a very perilous situation, and relieved from it by the very meritorious exertions of the salvors; and I think those services were rendered with very considerable risk and personal danger to the master and the men who accompanied him. As to the remaining part of The Rover's crew, their merit is of a more inactive kind; they consented to the attempt, and risked their common interest in the voyage, and so far acted liberally and meritoriously; but their merits cannot be ranked with those of the master and his boat's crew.

As to the owners, who are principal parties in these proceedings, the general principle of law is, that the claim of owners generally is very slight, unless, from the circumstances of the case, their property becomes exposed to danger, or they incur some real loss or inconve-

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The Jane. 2 Hagg.

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nience. There was no danger to their property in this case; but in the detention of their vessel, and consequential risk and expenses, I think there is a strong foundation on their part for a claim to share in the salvage. It is in evidence, that Chambers, being asked by the master of *The Jane*, "what would be the consequence of receiving assistance from him," replied frankly, "that salvage would be due." This answer proves the benefit of the feeling which this

\* Court has always promoted, in encouraging men by hopes [ \* 344 ] of reward to engage in hazardous services, when necessary for the preservation of property in distress at sea; and I presume that the master must have included the interests of his owners in this declaration, as his only justification towards them for deviating so largely from his course. I think, therefore, that the court is bound to act up to its general principle of encouragement to the owners as well as to the men; and I shall feel it my duty to assign a reward, accordingly, on liberal principles, though with due regard to the interests of the property. Schedules have been exhibited, of the actual loss sustained by the owners of *The Rover* in repairs for damage occasioned by towing, and other expenses, and also for demurrage; and these expenses are calculated at 350*l*. These accounts may be referred to the registrars and merchants, if it is required; or, as they seem not to be denied, I will adopt the calculation as to this part of the case; and I am disposed to award, altogether, 850*l*. in addition to the other charges. But as the parties stand in very different degrees of merit, and as the master is not in England, I feel myself bound to inquire what will be the distribution of this reward? and, perhaps, I shall act most cautiously, if I wait to see what scheme will be proposed on the part of the owners; but, in the mean time, the court wishes to be understood as expressing a decided opinion in favor of a specific allowance to the master and the boat's crew.

On the next court day the owners intimated that the expenses had been more than were expressed in the schedule, and that they had incurred the risk of forfeiture of their insurance, although the underwriters had indorsed the policy again. An affidavit was exhibited of an insurance broker to that effect; and the owners proposed to the court, that what was allowed as remuneration might be distributed according to the rates of interest which the crews of whaling-vessels took in the profits of the voyage. A schedule of such shares was exhibited.

The court thought it could not detract from what it had suggested in favor of the master and his boat's crew. It entertained some

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The Vecua. 2 Hagg.

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doubt as to the positive forfeiture of the insurance<sup>1</sup> in all cases, by deviation to assist vessels in distress, and questioned more particularly the equity of making an allowance for a risk which had not eventually been incurred; but expressed itself desirous to satisfy the owners, if it could be done with justice to other parties.

The court ultimately fixed the whole award at 1,200*l.*; giving 200*l.* to the master, 100*l.* to his boat's crew, consisting of five men; 200*l.* to the remaining crew of The Rover, to be distributed according to their respective interests in the profits of the voyage; and 700*l.* to the owners, including demurrage, repairs, risks, and all expenses.

[ \*346 ]

VECUA, Gomez.

March 2, 1831.

Two warrants for bounties, each for a distinct capture made by the same two vessels jointly, were made out in the joint names of their respective agents, and the proceeds paid on their joint receipts: each agent took possession of a portion of the bounties, but no severance or appropriation was made: one of the agents became a bankrupt with the proceeds of one warrant in his hands, the other agent is bound to distribute the proceeds of the other warrant between the two vessels.

THE Vecua, with her cargo and 300 slaves, and The Ycanam, with 380 slaves, having been condemned at Sierra Leone, upon the joint capture of H. M. S. Iphigenia, Captain Sir R. Mends, and The Myrmidon, Captain Leeke, the usual warrants for the bounty money for the slaves were made out in the joint names of Mr. Cook and Mr. Stilwell, the respective agents; and in October, 1825, were received by Cook, as agent to the senior officer.

The warrant for the slaves on board The Vecua was for 3,000*l.*; and the warrant on account of the Iphigenia, for 3,800*l.*

It was asserted by Stilwell, that, upon a calculation of the numbers of The Iphigenia and Myrmidon respectively to share, Cook admitted that the Myrmidon's gross share would be about 3,000*l.*; whereupon, at Stilwell's request, Cook delivered to him The Vecua

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<sup>1</sup> See The Waterloo, Birch, 2 Dod. 443. In America, it has been decided, that such deviation does not create a forfeiture of the policy. — Kent's Commentaries on the Law of America, vol. iii. p. 259, *et seq.* The Boston, 1 Sumn. 328.

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The *Vecna*. 2 Hagg.

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warrant, and retained the other as the estimated proportion due to The *Iphigenia* for bounty on account of both the slave ships. In Cook's affidavit the averment of such agreement was contradicted.

The warrants were paid in October, 1825, upon joint receipts. Stilwell took possession of the 3,000*l.*; and in April, 1826, Cook became a bankrupt, no distribution having been made. In July, 1830, on an affidavit of Mr. Hancock, the examiner of navy prize accounts, a monition was served on Stilwell to distribute the 3,000*l.*, to exhibit his accounts, and to show cause why he should not pay at the \*rate of 12 per cent. for any portion with- [ \* 347 ] held from distribution.<sup>1</sup>

An appearance was given for Stilwell, and the case came before the court in Hilary term 1831; when, after, hearing counsel, the proceedings stood over for a final decree, upon an intimation from the court that the interests of Sir R. Mends in the question were very important, and that it would be desirable that they should be supported. An appearance was accordingly given for the executor of Sir R. Mends, a further act on petition was entered into, and fresh affidavits exhibited, to the effect set forth in the judgment.

The principal question raised upon this monition was, whether the 3,000*l.* was to be distributed to The *Myrmidon* only, or, jointly, to The *Iphigenia*?

The *King's Advocate* and *Dodson*, in support of the monition.

*Phillimore* and *Addams*, for Mr. Stilwell.

*Barnaby* and *Nicholl*, for the executor of Sir Robert Mends.

#### JUDGMENT.

SIR C. ROBINSON. This case arises out of proceedings instituted by the treasurer of the navy, in his official capacity as guardian of prize interests, calling upon Mr. Stilwell to distribute a sum of 3,000*l.*, received by him as prize agent in 1825, being the bounty for slaves captured by H. M.'s ships, *Iphigenia* and *Myrmidon*, on the coast of Africa in 1822; but alleged by Mr. Stilwell to be appropriated exclusively to The \* *Myrmidon*. The 5 G. IV. c. 113, [ \* 348 ] and some previous acts, granted the bounty generally to the captors; and the practice of the treasury has been, to issue warrants directing the exchequer to pay the sum specified to the agent or

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<sup>1</sup> In the act on petition the claim for penal interest was abandoned.



agents of the captors named in the warrant. These warrants were accordingly issued, on the 11th of October, to Mr. Cook, agent for The Iphigenia, and to Mr. Stilwell, agent for The Myrmidon; and were delivered to Mr. Cook, as agent for Sir Robert Mends, the senior officer of the capturing ships, according to the rule usually observed in such cases, — whether by right, or mere courtesy of priority, does not distinctly appear.

The facts set forth on the part of Mr. Stilwell are, that there was another warrant issued on the same day for 3,800*l.* to the same agent, and for the same joint capturing ships, as bounty for slaves captured by them about the same time, in another vessel, The Yeannam; that on Mr. Stilwell's urgent request (intimated in argument to have arisen from doubts of Mr. Cook's responsibility,) a calculation was made of the respective numbers in the two ships, and it was understood and admitted that the share of The Myrmidon, in both bounties, would be about 3,000*l.*; whereupon Cook gave to Mr. Stilwell the warrant in The Vecua, retaining the other warrant as the estimated proportion due to The Iphigenia of the total amount of bounty money granted for the slaves in both vessels. On the 14th of October the warrants were cashed at the exchequer, on a joint receipt being given by Cook and Stilwell, which might seem to bring back the proceeds again to the state of the interests in the respective warrants. Mr. Stilwell asserts that he was preparing lists [\* 349] \* for distribution, when Cook became bankrupt in April, 1826; but it is to be lamented that the court has no evidence of any thing that was done in the intermediate time, and previous to this event.

When this case came on before, it did not appear in what manner the averments on the part of The Myrmidon were received by The Iphigenia, — whether they were admitted or denied; or whether any acts had been done which might be construed to recognize the exclusive title of The Myrmidon in this warrant. The court, therefore, then directed the distribution of so much as was admitted to belong to The Myrmidon, and reserved the consideration of the remainder till notice should have been given to the representative of Sir R. Mends of these proceedings. An appearance has since been given for the executor of Sir Robert Mends, and for the officers and crew of The Iphigenia; and it is said that instructions for such an appearance had been given from the first, though the proctor forbore to act, not very properly, I think, till the issue of the proceedings on the part of the treasurer of the navy should be terminated. Mr. Cook has made an affidavit also, in which he denies that the warrant was given for distribution to The Myrmidon only; but asserts, that it was

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The Vecua. 2 Hagg.

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delivered to Mr. Stilwell to be distributed to both ships, and that the other warrant was retained by him to be distributed in like manner. He also denies that there was any calculation or admission of the proportion of The Myrmidon, or any appropriation to that effect. It is shown, also, that the claim was advanced against The Vecua so early as 1826, and ever since; and that Greenwich Hospital, under 5 Geo. IV. c. 107, s. 3, had actually claimed and received a

\* dividend so early as January, 1827, from the assignees of [ \* 350 ] Cook, as a debt due to the two ships; and that the hospital has received other dividends since, amounting altogether to 3s. 8d. in the pound. In all these particulars, therefore, the assertion on the part of Mr. Stilwell was materially contradicted. There is no acknowledgment of the claim, nor any act done from which a recognition of the asserted assignment can be inferred.

The question then is materially changed in the circumstances under which it now comes before the court; and whatever disposition the court might then have expressed to sanction the claim of The Myrmidon if it was not substantially disputed, it must now look at the proofs as they stand at present, and be guided in its judgment by a fair estimate of their comparative force and effect. The contradiction in the statement of the two agents, is undoubtedly greater than might have been expected from two gentlemen of experience in business, and of great respectability; but if the affidavits are attentively examined, the difference is not perhaps so great as appears at first sight; for although it is asserted in the correspondence with Mr. Hancock, that The Vecua's warrant was delivered as a transfer and appropriation of The Myrmidon's share, and for distribution to The Myrmidon alone, that is not stated in the affidavit of Mr. Stilwell, or at least it is expressed or intimated only in such general terms as are not inconsistent with the supposition that he intended to distribute the same to both ships as asserted by Cook; and I think the acts done by Mr. Stilwell in preparing to make what he calls a *pro forma* account as for both ships, imply that he \*did at [ \* 351 ] that time intend to make up the account in that form, although, after Cook's bankruptcy, he insisted on the right to make up the accounts as for a capture by The Myrmidon only; and I think this is not inconsistent with the notion, which might be entertained by him, that he had secured the exclusive interest in the warrant for The Myrmidon, by the possession which he so held.

The court referred to the affidavits of Cook and Stilwell, and proceeded, I think the affidavits may be reconciled in this way: and I do not see how any other mode of distribution could be conformable to the provisions of 54 Geo. III. c. 93, the act for the protection of prize

property. It is pleaded, however, on the part of *The Myrmidon*, that the delivery of the warrant was an actual transfer, and became a vested interest in *The Myrmidon*; and it is argued to the same effect, though in rather more qualified terms, that it constituted a virtual and equitable title which the court would not disturb. On the part of *The Iphigenia* it is contended, that there is no proof of the transfer, and that there was no transfer, and could be no transfer intended, as the agents were joint trustees for both ships, and could not sever their trusts, or separate the interests of the parties otherwise than by distribution. And this argument is founded on the authority of what the court did in *The Tarragona*.<sup>1</sup> But I think that case was essentially different; as the warrant there was for a different description of prize property — booty on a conjoint expedition, and constituted the persons trustees specifically in the body of the grant; and, [ \* 352 ] therefore, \* although that principle was adverted to by the court under an opinion of an eminent lawyer, the late Lord Ellenborough, as a consequence of such an appointment, it does not, I think, apply necessarily to an appointment like the present, in which the agents are designated only as the representatives of the respective ships; and the argument which has been pressed on that point, seemed to lead further than the counsel himself was disposed to follow it, in all its consequences. I shall, therefore, dismiss that argument. As I am not prepared to say that the agents might not have been competent to sever the property, previous to distribution, if it had been done in a distinct and regular manner, and according to the form which is, I think, recognized to that effect by the schedules annexed to the 54 Geo. III. c. 93, s. 81, in which there is a column for the specification of the capturing ship or ships, and another of the agent or agents by whom final distribution is to be made.

The mode prescribed by the 54 Geo. III. c. 93, appears to be, that the principal agent, or the agent holding the money, shall ascertain, by comparison of prize lists, a scheme for distribution with the other agents, and the proportion of the several ships; and that they pay such proportion in gross to the respective agents, to be by them distributed to the several ships; and, in this way, the respective interests would become separate, and appropriated to the individuals to whom it belonged. It is not necessary for me to say, whether there may not be other modes of severance; that may belong, perhaps, more properly to other courts. The law contemplates no exception with

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<sup>1</sup> 2 Dod. 487.

reference to any such accident as has happened in this case. The danger \* might have been the other way, and the [ \* 353 ] . sincerity of the alleged apprehension could very rarely be proved or justified. The remedy, also, does not go far enough. The final distribution could not take place till all the operations contemplated in the statute had been observed; and if you suppose different captures to be made by the same ships at different times, when changes might have taken place in the crews, as observed by Dr. Nicholl, the interests would not be identically the same, and would not be properly a subject of set-off, or reciprocal transfer in the form asserted to have been used and adopted in this case. What Mr. Stilwell states in his affidavit shows, I think, that he was acting agreeably to the form prescribed by the statute; because he says, that he proceeded immediately to calculate the proportion belonging absolutely and properly to The Myrmidon, being about 1,000*l.*, reserving the remainder for subsequent distribution when the numbers of The Iphigenia could be ascertained, so that the vested interests and appropriation, that is suggested to have been made by the delivery of the warrant, could not be applied to the use of his principals, till other things connected with the other parties could be settled and established by further conference. This I consider to have been the real intention of the agents; for that Mr. Stilwell received the money to be distributed in form to The Myrmidon only, does not appear to me to be credible; and I do not see how such a form of distribution could have been consistent with the provisions of the act of parliament. In any form of real transfer it seems essential that it should be distinct and capable of proof in a direct and positive manner; for property does not \* usually pass by parol, or by [ \* 354 ] mere inference; and in this case there are two transfers to be considered, the transfer of The Vecua's share, which is said to have passed by delivery; and the transfer of The Myrmidon's interest in The Ycanam, which is supposed to have resulted from the other by implication or silent operation of law. Suppose Mr. Stilwell had died, or had been lost with The Vecua's warrant in his possession without explanation, or had become bankrupt immediately after the delivery, what would have prevented The Myrmidon's crew from claiming on The Ycanam's warrant; or, how could the interest in that warrant have been adjudged in any other way than according to its tenor? It appears to me that Greenwich Hospital has claimed for The Myrmidon and for its own interests out of the other warrant, as a debt on the assets of Mr. Cook's estate; and although Mr. Stilwell might, as he says, not be informed of it, and may not be affected by it, it shows the inconvenience, and, I may say, the imperfection

of such secret titles, when other persons are acting on the primary and the ostensible title, as the agent and the assignees, and Greenwich Hospital did in this case.

On the supposition before noticed, that Mr. Stilwell might have become a bankrupt, how could any interests for run shares or forfeitures devolving on Greenwich Hospital, or the shares of The Iphigenia in that capture, have been recovered out of the equivalent supposed to have been assigned to them by this transfer in the warrant of The Ycanam? And yet, all these resulting interests ought to be

protected in any transfer of prize proceeds that can be set [ \* 355 ] up in this court, as a legal \* title. In this view of the case,

when it is said that the equity of the case is the law of the case, it may, perhaps, with more propriety, be said, the legal title will be the equitable title; for there is no other way in which all interests in such property can be protected, at least in these courts. In the same manner, when it is represented to be a great hardship to the crew of The Myrmidon, who probably relied on receiving their share from the money in Mr. Stilwell's possession, and may have suffered a disappointment of those expectations, it is to be remembered that the money could only have passed in this form, in consequence of other acts of final settlement, as provided in the statutes, and in the settlement by mutual receipts, which Mr. Stilwell would then have made with Mr. Cook against money in his hand belonging to The Myrmidon, on The Ycanam's warrant. It is, therefore, a disappointment, in consequence of something that was not done by their agents, and is a hardship, if any, of the same class of hardships as those described to have been sustained on the part of The Iphigenia — hardships sustained by the principals for the acts or defaults of their agents.

On these considerations, looking to the duty which the court has to discharge of adhering to the previous and original title of The Iphigenia, till it is shown to be fully satisfied and discharged, and being of opinion that no such transfer is shown to have passed in this case as will have that effect, I feel bound to direct the distribution to be made to The Iphigenia, according to the interests conveyed to her in that warrant.

The court directed 1,485*l.* 16*s.*, deposited by Mr. Stilwell [ \* 356 ] in the registry, as the proportionate \* share of The Iphigenia in The Vecua warrant, (after deducting the costs of all parties in the present cause,) to be paid out to Mr. Barwis, the substituted agent of Mr. Cook, and also executor of Sir R. Mends.

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The Ligo. 2 Hagg.

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Ligo, Ligo.

April 19, 1831.

In collision, the owners are only entitled to indemnification if the damage is occasioned by the fault or misconduct of the vessel charged as the wrongdoer; therefore, the collision having arisen from the neglect of the vessel damaged, the owners of the other vessel dismissed, with costs,

THIS was a cause of collision. The libel pleaded— That on the 11th of December, 1829, The Express, a schooner of 114 tons, together with a brig, The Ligo, and several other colliers, were detained off Flamborough Head by the state of the wind; that about five o'clock on the evening of the 11th, the schooner, which, with the other vessels, had been tacking during the day, laid to about a mile from Speeton Cliff, with her head to the southward, (the wind S. W. by S.,) under the forestaysail, foresail, foretopsail, and mainsail; that the forestaysail was full, and the foresail hauled close to windward, with the bow line fastened to the foremast shroud; that the topsail was aback, and the mainsail scandalized, (the peak downward,) and the helm in the lee-becket; that after the schooner had laid to, The Ligo was observed to windward of the schooner, on her starboard bow, and between land and the schooner, and standing towards land on the starboard tack; that shortly afterwards the brig wore round, got the wind aft, and came towards \* the schooner [ \* 357 ] with the larboard main-braces and starboard fore-braces checked, and with all sails full, and struck the schooner;<sup>1</sup> that the vessels became entangled, and, to separate them, the lanyards of the schooner were cut; that her crew then got into the brig; the schooner drifted away, and the brig promised to tow her into Scarborough, but afterwards refused; that a fishing smack was then engaged to tow the schooner, but could not accomplish it, from the insufficiency of the smack's lines; and the schooner was ultimately lost.

On the part of The Ligo, it was pleaded that the schooner employed the fishing smack in preference to the brig; that, from the unfavorable state of the weather, the smack missed stays, and the towing ropes broke. In further contradiction to the libel, it was alleged that the schooner was not lying to at the time of the collision,

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<sup>1</sup> The libel did not plead in what part the schooner was struck; but her crew swore that the brig stove in the bow, and carried away with her bowsprit the three starboard foremost shrouds.

and that the brig was on the larboard tack, with her head to the westward, towards the land; that the schooner, having passed to windward, wore in about one quarter of an hour, (while the crew of the brig were setting her topsails, which were aback,) in order to stand from the land, and, coming suddenly on the brig, struck her on the starboard bow.

There was no material difference as to the wind; and it was not denied that, at the time of the collision, one vessel could not distinguish another at the distance of a mile. Upon the whole,  
[ \* 358 ] the witnesses \* on either side supported the respective pleas.  
The action was entered at 1,200*l*.

*The King's Advocate* and *Addams*, for the schooner.

*Dodson* and *Haggard*, for the brig.

The COURT (SIR C. ROBINSON) addressed Captain Brown and Captain Stephenson, the Trinity Masters, to the effect following:—

This is a case of collision, in which a vessel, *The Express*, has been lost in consequence of that accident; and the law will support a claim for indemnification on the part of the owners of that vessel, provided it can be shown that the loss was owing to the fault or misconduct of the vessel charged as the wrongdoer. But there are two other alternatives. The fault may have been on the side of the vessel that is lost; or the accident may have happened from unavoidable circumstances, so as to be rather a common misfortune than a subject of blame or complaint. In many cases, there are prominent features which may enable common understandings to form a judgment between them. There may be a direct course prescribed to each vessel, and the opportunity of pursuing it according to the known rules of navigation; and if those rules are not observed, a manifest test is thus furnished of the propriety or impropriety of the management of the respective vessels. But this is not such a case. In this case, both vessels had been tacking and lying to within a narrow compass during the day, and continued so to do in the evening; the rules, therefore, by which their conduct and management are to be judged, will not be so apparent to common judgments. There may be prac-

[ \* 359 ] tical \* tests, however, to be extracted from the circumstances by persons of nautical judgment and experience; and it is a great satisfaction to the court to be assisted by gentlemen who will be able to draw conclusions from facts which common judgments might very imperfectly appreciate. The court, therefore, will rely on the opinion which you may form of the whole case, and requests

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The Ligo. 2 Hagg.

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your particular attention to the evidence with reference to the three following points:—1. Does the evidence furnish any decisive inference by which the court may judge which vessel was lying to, and which was not, as this is the plea on which both parties rely? 2. If only one vessel was lying to, does it follow that the other was the cause of the accident? And, 3. Supposing that the first two questions are answered adversely to *The Ligo*, and it should be your opinion that *The Ligo* was the cause of the accident, does it follow that she was the cause of the loss?—or is any, and what part, of the consequences to be attributed to the delay imputed to *The Express*? This latter inquiry may be a new consideration, and may, more particularly, belong to the court; but it is so connected with the facts of this case that the court would wish to have your opinion upon it, if in your judgment the consideration of it should be necessary.

*The Trinity Masters*, after consultation together, delivered a written opinion, stating—1. That the brig (*The Ligo*) was lying to, and that *The Express* was not properly lying to, but proceeding; and that if it could be true (which they did not admit) that the schooner (*The Express*) was lying to, she was not properly laid to, inasmuch as, her mainsail \* being scandalized, it was not properly set for the lying to, with reference to the sails which were then set on the foremast.<sup>1</sup>

2. That the collision was occasioned by the neglect or inattention of the schooner's own crew.

SIR C. ROBINSON. The court perfectly concurs in the opinion of the *Trinity Masters*, so far it can form an affirmative judgment on such facts. The law requires that there should be preponderating evidence to fix the loss on the party charged, before the court can adjudge him to make compensation; and in this case the complainant has not sufficiently sustained the burden of proof imposed upon him. It is the duty of the court, therefore, to dismiss *The Ligo*; and as the owners of that brig have been brought to answer, at considerable expense, a charge which the evidence has failed to support, they are entitled, as the court has held in other instances, to be dismissed with their costs.<sup>2</sup>

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<sup>1</sup> Dewar, one of the crew of the schooner, deposed that the schooner's mainsail was too big, and that if it had been set for her to lay to with, it would have brought her too much up into the wind.

<sup>2</sup> See *The Catherine*, of Dover, *supra*, 154.



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The Charlotta. 2 Hagg.

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[ \* 361 ]

\* CHARLOTTA, Nesser.

May 14, 1831.

The court always jealously maintains the right of original salvors, unless further assistance is necessary for the preservation of the property.<sup>1</sup> In a case of derelict and of great merit, the court gave to the original salvors the usual salvage, two fifths of (the whole value) 2,394*l.*, and to a revenue cutter, whose assistance was beneficial, 100*l.* Expenses out of the remaining property.

On the 3d of December, 1830, The Charlotta was found a derelict off the coast of Norfolk. The Greyhound and Morning Star, two Winterton yawls, and thirty-four men, went off to the wreck; they were in a few hours joined by The Ino with twenty men, upon which The Greyhound and seven men returned to the shore. On the following morning, about two hours before the derelict was brought into Yarmouth Roads, the revenue cutter, The Royal Charlotte, commanded by Lieutenant Harmer, came up, and the principal question in the case related to the claim of this cutter to share in the salvage. The ship was of 200 tons, laden with deals and iron: and the value of ship and cargo was estimated at 2,394*l.* Bail was given in 1,400*l.*

*Dodson and Nicholl*, for the salvors.

The *King's Advocate* and *Addams*, for the cutter.

*Haggard*, for the claimant of the cargo.

#### JUDGMENT.

SIR C. ROBINSON. This is a case of great merit in the original salvors, which is not denied. The vessel had been abandoned by the master and crew on Hasborough Sand, on the 2d of December, and on the morning of the 3d, a body of Winterton boatmen, or beachmen, descried her, and resolved to put off to her assistance: they went in two boats, and succeeded with difficulty in getting on board.

There is no evidence on this part of the case except their [ \* 362 ] own; but that may be taken \* as uncontradicted, and the court sees no reason to make any deduction from it. They rowed through a heavy sea, and very broken and dangerous water on

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<sup>1</sup> [See note to The Maria, Edw. 175.]

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The Charlotta. 2 Hagg.

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the sand, and boarded, not without some danger of being dashed against the vessel. They then steered the vessel with their boats for the mouth of the Cockle gat, about eight miles from Yarmouth, and anchored off the buoy at two o'clock at noon on the same day. They remained there all night, and at break of day, between seven and eight o'clock, they were weighing their anchors in order to proceed through the gat to Yarmouth, when a boat from a revenue cutter came up and inquired who they were, and what was the condition of the vessel. The cutter's boat went back and returned with an order from the commander to send a rope on board, that he might tow them through the gat. About the same time a Gorlestone pilot plied them, but they declined his assistance, saying that they knew the gat as well as he did. The salvors protested against the interference of the cutter as unnecessary, and some conversation passed, in which the commander is reported to have said, "he would not interfere with their interest;" or "that he did not mean to dispossess them," according to the different representations of the parties. The cutter proceeded to tow the vessel through the gat, and brought her safe to Yarmouth between ten and eleven o'clock; and the question between these parties is, whether any reward is due to the cutter, and in what proportion? The boatmen maintain that she is not entitled to any share; that her interference was unnecessary and obtrusive, and that the claim of the cutter should be rejected with costs.

\* On the part of the cutter it is alleged, that the boatmen [ \* 363 ] were inexperienced, not sufficiently acquainted with navigation to conduct a vessel through the dangerous passage of the gat, and that the vessel would have been lost on the sand, if the cutter had not taken her in tow. A great number of affidavits have been exhibited on both sides, much beyond what could be necessary, and beyond what the court approves, as they tend rather to confuse than to assist the case, and have increased the expenses very improperly.

It is established that many of the beachmen had been on a voyage to Greenland; had navigated fishing boats for many years, and had piloted vessels through the gat. It is therefore scarcely credible that such men should have been confused, and, as the cutter asserts, should have betrayed great ignorance in weighing anchor, without loosening the sails. The men thought themselves competent, and were acting in a matter in which their own interests were depending: and there is no reason to suppose they were not generally capable to navigate the vessel through that passage. They had reported the vessel to the chief authorities ashore; and had an opportunity of obtaining a pilot

from shore, if they thought such assistance necessary; and they had declined the offer of one pilot who came up whilst they were weighing their anchor. In this, I think they were imprudent, and perhaps wrong, and that they would have discharged their duty better if they had taken a pilot for the greater security of the property. But it is still to be inferred, from their conduct, that they relied on [ \* 364 ] their own experience \* and knowledge of the navigation of the coast, and I see no reason to impeach their competence.

There were, however, some difficulties to be encountered in getting through the gat, in which the assistance of the cutter appears not to have been wholly useless, and the question is, whether it was a case in which the second salvors were justified in superseding the first, so as to affect either their interest or that of the owners of the derelict in the amount of salvage? The court has been always jealous in maintaining the right of original salvors, unless it appears that further assistance is necessary for the preservation of the property. This principle was strongly held by my predecessor in the case of *The Maria Kilstrom*,<sup>1</sup> and in another case, *The Rose in June*;<sup>2</sup> in which the court held that the original salvors were insufficient, and divided the salvage. The commander of the cutter here alleges, that it was impossible that the first salvors could have towed the vessel through the gat; and if that is established, then assistance was absolutely necessary; but it is afterwards repeated in rather weaker terms, "that their assistance in towing was not unnecessary, and was very important." This is rather a lower averment, so far as the right of the original salvors is to be considered, though the interference might not be blamable or improper, or without beneficial consequences to the owner of the property.

The navigation of the gat appears to be sometimes very difficult, owing to the setting of the tide, which flows from north to [ \* 365 ] south in the direction \* of the Channel, whilst the course of the vessel was N. W., with the wind at E. S. E. There was a difficulty, therefore, it is said, in steering the vessel so as to make the Channel, without danger of being drifted by the current on the eastern sand; and the salvors charge the cutter with ignorance in not making sufficient allowance for the current, and in towing too near to the south entrance: and it appears from the evidence of the pilot that there was some hailing and calling from the vessel to that effect.

The vessel was, however, brought safely through the gat, and there

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<sup>1</sup> Edwards, 177.<sup>2</sup> December 5, 1809.

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The Donna Barbara. 2 Hagg.

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are strong testimonies to the general skill and good conduct of the commander of the cutter; and I treat the charge of ignorance against him, therefore, with as little attention as those made against the salvors. I think that the services so rendered by towing through such a passage was not an unseasonable assistance, and that they were offered by the commander of the cutter with good faith and justifiable intentions. At the same time, there is the evidence of the harbor-master and of a naval officer, very competent witnesses, in favor of the original salvors, and stating that in their opinion they were fully able to have effected the bringing of the vessel into port. In such a case, I shall not detract from their merits, or deduct any portion of the two fifths which I award as the salvage usually given in derelict. But, thinking that the services of the cutter were meritorious, and might have been very beneficial in contributing to the protection of the property, I shall act on the authority of my predecessor in the case of *The Maria*, by giving a small additional reward to the cutter. The court \*there gave 50*l.* to a king's [ \* 366 ] cutter who took that vessel in tow, and 30*l.* to a pilot. In the present case I shall award 100*l.* to the revenue cutter, to be paid out of the remaining property, together with the expenses.

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DONNA BARBARA, Luiz.<sup>1</sup>

July 13, 1831.

The instructions annexed to the convention with Portugal, embodied in 5 G. IV. c. 113, imply that the seizures of Portuguese slave-ships are to be made under the personal direction of the commander of a ship of war: Held, therefore, that a seizure by an open boat, (the crew of which was borne on the books of a king's ship,) commanded by an officer of the rank required to make the search, but actually putting off from an unauthorized tender, and at a distance of 1,500 miles from the king's ship, did not entitle the ship to the moiety of the proceeds or to the bounties under 5 Geo. IV. c. 113, ss. 67, 68, the slave-ship having been condemned by the competent court as prize to a tender to a king's ship. The 5 Geo. IV. c. 113, s. 71, gives the Court of Admiralty power to decide on claims to share in the proceeds or bounties in slave captures, although the condemnation has passed in the mixed commission court.

HIS Majesty's ship *Sybill*, commanded by Sir F. A. Collyer, one of a squadron of which he was commodore, was stationed off the coast of Africa for the prevention of the slave-trade, and on the 10th

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<sup>1</sup> [The decision in this case was reversed on appeal. See 3 Hagg. Ad. R., Appendix C.]

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The Donna Barbara. 2 Hagg.

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of January, 1829, being at the island of Fernando Po, the commodore despatched one of the boats of The Sybille, under the first lieutenant, (Harvey,) with written instructions to seize and detain all vessels trafficking in slaves, contrary to certain treaties. On the boat reaching Sierra Leone on the 21st, the crew, to protect themselves from the climate, went on board The Paul Pry, a former slave-ship, which had been there condemned and purchased by the commodore. On the 15th of March, The Adorinta, a Brazilian brig, captured by The Sybille, appeared off the entrance of the Sierra Leone river, in charge of Mr. Browne, a prize-master from The Sybille. She had in company The Donna Barbara, a Brazilian schooner, with a cargo of 367 slaves, shipped in violation of the treaty between this country and the Brazils. This vessel and cargo had been seized by Browne on his course to Sierra Leone. Lieutenant Har-  
[ \* 367 ] vey \* went off to these ships in the boat of The Sybille, and upon his informing Browne that he was not authorized to effect the seizure, and desiring him to release her, the latter returned the papers to the master of the schooner, whereupon she was seized by the boat under Lieutenant H.'s command, carried into Sierra Leone, and there condemned by the mixed commission, "as having been taken and seized by The Paul Pry, a tender of The Sybille."<sup>1</sup>

It was alleged for The Sybille, that this description, as a tender, was owing to some error in the institution of the proceedings; for that at the time of the seizure The Paul Pry remained moored a considerable distance up the river; and that the seizure being effected by a boat of The Sybille, detached therefrom under the command of an officer of the rank required by the treaties, and the vessel having been afterwards condemned by the commissioners appointed in virtue thereof, the commander, officers, and crew of The Sybille were legally entitled to one moiety of the proceeds of the schooner, and also to the bounty money for the slaves on board.<sup>2</sup>

For the crown the claim of The Sybille was denied; and it was alleged that, by the fifth article of the additional convention with Portugal, signed at London on the 28th of July, 1817, it is

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<sup>1</sup> When this case came on in the High Court of Admiralty, it was postponed for certain papers connected with it; these were furnished by the government, and among them was the sentence of the mixed commission, which stated, "that The Donna Barbara was brought into Court, as a prize to The Paul Pry, tender to H. M. S. Sybille, and commanded by Lieutenant Harvey, duly authorized and furnished with instructions to make seizures of vessels engaged in the illegal traffic of slaves."

<sup>2</sup> 5 Geo. IV. 138, s. 67, 68. The Slave Abolition Act.

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The Donna Barbara. 2 Hagg.

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expressly \* stipulated that "the visit and detention of slave- [ \* 368 ] ships shall only be effected by those British or Portuguese vessels which may form part of the two royal navies, and by those only of such vessels which are provided with the special instructions annexed, &c., and which are required to be signed for the vessels of each of the two powers by the minister of their respective marine."<sup>1</sup> That The Paul Pry (formerly Arcenia) was purchased for Sir F. A. Collyer, to be used as a tender to The Sybille, and that the boat of The Sybille was, on the 15th of March, in the service of the schooner, and that The Donna Barbara, on her arrival within the limits of the port of Freetown, was boarded by some of the persons belonging to The Paul Pry. That the memorial addressed, in November, 1829, to the treasury by the agents of The Sybille, stated, "that a tender (The Paul Pry) belonging to The Sybille, together with one of her boats, seized and detained, &c."<sup>2</sup> That at the time of the seizure the schooner had not left Sierra Leone since her condemnation, and had never joined or become attached to The Sybille;<sup>3</sup> and that the boat so \* detached as aforesaid from The Sybille was [ \* 369 ] not and could not be authorized by Sir F. A. C. to make captures of slave-ships either for her own benefit or for that of The Sybille, then distant about 1,500 miles.

The rejoinder set forth the necessity of upholding such seizures by boats made under various contingencies; that it had been usual for the commodores to purchase and station condemned vessels off the river to receive the sick and wounded, and for shelter; that more captures were made by boats than ships, and had received the approbation of the admiralty. Lieut. Harvey, in his declaration on oath, which accompanied The Donna Barbara's papers, described himself as a Lieut. of H. M. S. Sybille, and that the capture was effected by a boat of that ship, and also stated the place where the same was effected; so that all the circumstances of the capture were under the consideration of the Mixed Commission Court; which court,

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<sup>1</sup> In an affidavit by Sir F. A. Collyer, made on the 28th of June, 1831, he stated, "that during his command of the African station, he never received from the Lords of the Admiralty any orders to deliver the signed instructions, required by the treaties, to the officer sent in command of the boats or tenders, save the commission and instructions he delivered to the officer appointed to command the tender named The Black Joke."

<sup>2</sup> The Lords of the Treasury declined to direct payment of the moiety of the proceeds and of the bounty for the slaves to The Sybille, and referred the memorialists to this court, under 5 Geo. IV. c. 113, s. 71.

<sup>3</sup> Sir F. A. Collyer, in his instructions to Lieut. Harvey, directed him, on his arrival at Sierra Leone, to fit the Paul Pry for sea, and despatch her to join him off Whydah.

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The Donna Barbara. 2 Hagg.

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by condemning the property, and decreeing the emancipation of the slaves, finally determined the capture itself to have been legal according to the stipulation of the convention.

*Addams and Nicholl* for *The Sybille*.

*The King's Advocate* and *Dodson, contra*.

#### JUDGMENT.

SIR C. ROBINSON. This is a proceeding on the part of Sir F. A. Collyer, and the officers and crew of *H. M. S. Sybille*, to enforce by the process of this court their claim to bounties for a certain number of slaves captured in this ship, *The Donna Barbara*, and condemned under the Brazilian treaty by the Mixed Commission Court [ \* 370 ] at Sierra Leone; and the Lords of the Treasury have concurred in referring the question to this court. The act of parliament, (5 Geo. IV. c. 113, s. 71,) gives the Court of Admiralty power to decide on claims to share in the proceeds or bounties in such captures, although the condemnation has passed in another court; and this is a jurisdiction which the court exercises freely, so as to arrive at the real facts of the case. It did so in *The Rio Pongas* case in 1824, in which bounties were claimed for slaves captured on an inland expedition under a condemnation in general terms, that might have implied, without such examination, that bounties were due, as of course, for an ordinary capture at sea; but the court determined against the claim, on the ground that the capture was not such as was recognized by the treaty. And, in the present case it must exercise some inquiry in this case, because the plaintiffs themselves aver against the sentence, that there has been an error in describing the capture as made by *The Paul Pry*, as a tender to *The Sybille*; whereas it is alleged, that the capture was actually made by the boat of *The Sybille*, independently of the interference or operation of *The Paul Pry*.

I have made these observations because an objection has been urged in argument, that as the court at Sierra Leone had pronounced the capture to be legal, this court will not impugn that sentence, or call into question any fact which may affect the legality of the sentence under the convention, as it is alleged any inquiry into the character and competency of the captors will do incidentally. This [ \* 371 ] argument might raise very important questions if it was pursued. It is to be observed, that the act of parliament empowers this court to carry into effect the sentence of the Mixed Commission Court, and it may be questionable how far the court can be required to act, ministerially, with regard to such sentences, without

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The Donna Barbara. 2 Hagg.

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power of examining them on any point that may be essential to the claim on which it has to decide. This is a special case, therefore, in which I do not wish to introduce more general questions than properly belong to it. The act on petition does not deny the legality of the sentence, and it will not be necessary for me to do so. The question now to be decided does not depend on the convention alone; the claim to bounties must be founded on the further act of the British government in granting bounties, and on the proclamation for the distribution of them.

The facts of the capture were shortly these: The Sybille was lying at Fernando Po; and Sir F. Augustus Collyer had despatched Lieut. Harvey with a slave-ship to Sierra Leone for adjudication; on board the slave-ship he sent at the same time a small gig, or ship's boat, and about twenty men to man another gig belonging to The Sybille, which had been left at Sierra Leone for repair. At Sierra Leone was lying also a ship, called The Paul Pry, which had been purchased by Sir F. A. Collyer to be used in the service of The Sybille, and in vague and popular language as a tender to The Sybille; but without any orders from the admiralty for the appointment, and without any recognition of the admiralty of any public character attached to that ship. She is described in the affidavit as being unarmed, and \*intended to be used as a sort of boat-house, or pro- [ \* 372 ] tection from the climate, for the boats' crew in returning down the coast; and the boats' crew were using her for that purpose at Sierra Leone, and made the capture by putting off from her when the prize appeared at the mouth of the harbor. It is said that there was a mistake on the part of the court at Sierra Leone in making mention of The Paul Pry as connected with the capture, since Lieut. Harvey distinctly informed the agent or proctor there that the capture was made by the boat's crew of The Sybille. I have no doubt that that declaration was made, not in contradiction to the use of The Paul Pry, but as a further assurance that the captors were identically the crew of The Sybille—a caution which, I perceive, the court at Sierra Leone has used in other cases, in dealing with the anomalous character of tenders; for the affidavit does not state that Lieut. Harvey was ignorant of the description given of the capture, or that he remonstrated against it.

The bounties were first given by the 1 & 2 Geo. IV. in 1821. So early as 1823, a case arose in the West Indies, in which the use of tenders in making captures, under the Spanish convention, was first brought to notice in the correspondence of the British commissioner at Havana; and in 1824, The Fabiana, and in 1826, The Nicanor and Principe de Guinée occurred at Sierra Leone, in which it became a



question how far the use of subordinate vessels by the ships of war specifically authorized to make the capture was reconcilable to the terms of the treaty. In *The Fabiana* the commissioners suspended their judgment till they were advised that they ought to proceed, as it could not be the meaning of the treaty that every departure from the rules or instructions included in the treaty for the regulations of seizures, should vitiate the capture, as between the two countries; that the contracting parties in adopting the ships of war of the two powers reciprocally as instruments of seizure, might be supposed to have adopted the rules applied to the regulation of the naval services of the two governments respectively. That exposition of the spirit of the treaties appears to be reasonable. The treaty purports that it was to be executed according to the spirit; and there was at that time a commissioner of the foreign power, a member of the court, who concurred in this interpretation. So stands the condemnation as relating to Portugal.

In respect to our own policy in granting bounties as special rewards to his Majesty's ships employed under the convention, the claim must be sustained according to the rules of our own service, and the construction which has been put upon them in other cases. Now in our own service, the tenders, properly authorized, have always been considered as identified with the ship to which they are attached, even when acting at considerable distances. Such was the answer of the admiralty in *The Nicanor* and *Principe de Guinée*, and in other cases, and those captures were sustained. The proclamation of the 30th of June, 1827, directs accordingly, "that all rewards for arrests and seizures made by tenders employed by my order, or by the order of the Lord High Admiral, or any commissioners for executing the office of Lord High Admiral for the time being, or by boats or [ \* 374 ] officers belonging to and detached from his Majesty's ships and vessels, are to be shared by the officers and men of the ship or vessel to which such boat or officers belong, in the same manner as if the seizure was made by the said ship or vessel."

If *The Paul Pry* had been a tender so employed, the capture made from her might have been sustained as made by her, and *The Sybille* might have been entitled under the proclamation; but that ground has not been relied on. But it is said the boat's crew are to be considered in their immediate relation to *The Sybille*, notwithstanding their temporary and incidental connection with *The Paul Pry*, and that their acts will inure to the benefit of the whole ship's company. I shall so far admit the explanation offered of the capture, as to examine what rights can be communicated to the ship by a capture made by a boat's crew so detached. It has been pointed out in the argu-

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The Donna Barbara. 2 Hagg.

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ment that all the clauses of the instructions annexed to the treaty seem to imply that the capture should be made under the personal direction and responsibility of the captain or commander of the ship of war. He may send a lieutenant to search and examine a suspected ship, and that clause furnishes some inference as to the use of boats contemplated in the treaty; but the commander is to certify the papers, and do other acts which are required as a guaranty for the cautious exercise of this new power of seizure given to the ships of another nation.

Here, again, I should be disposed to support the rights of the ship in captures by boats, so far as could be shown to be reasonable or agreeable to the rules of the service; but the peace of the world is concerned in preserving with accuracy \*and pre- [ \* 375 ] cision the lineaments which characterize the public force of independent nations. I cannot extend these relations indefinitely, but must confine myself to such exposition of general terms as may be consistent with the object of the service, and sanctioned by public authority.

In the case\* of *The Melomane*,<sup>1</sup> which happened in 1803, on a question of prize of war, the very same relations of a boat belonging to a king's ship, but acting from an asserted tender belonging to the captain of the king's ship, but not authorized by the admiralty, underwent much discussion; and, in that case, my predecessor being of opinion that the tender was not authorized to take for the benefit of the ship, held the ship's boat, which had been sent on board the tender, to be identified with that vessel, and merged in her character. That might be a sufficient authority to be applied to the very similar circumstances of this case; but I should be sorry to conclude the case on those grounds, if I could find any authority, in reason or in any recognized usage of the navy, for the proposition now advanced — that a capture like the present, made by an open boat, at the distance of 1500 miles from the ship, and without any reference to the discretion or judgment of the commander of the ship, could be deemed a description of service comprised in the clause of the proclamation which I have read. Neither reason nor usage, so far as I am informed, will justify such an interpretation; and I have used the best means of obtaining authentic information on the subject.

The records of this court do not furnish any instance \*of [ \* 376 ] such extension. The reasoning of the court in *The Melomane* was against it. I think the detachment of boats and officers,

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<sup>1</sup> 5 Rob. 41 — 47.

mentioned in the proclamation, must be understood with some limitation; and I can suggest no other than such a practical dependence on the orders of the commander, to be executed within the sphere of his personal superintendence and direction, as will substantially connect him with the responsibility attached to the capture.

It is asserted in the act on petition that the clause respecting detached boats was introduced into the late proclamation with reference to this class of cases; but that is not correct, since it was inserted first in the proclamation of 1816, relating to revenue seizures, and has been since continued.<sup>1</sup> It is said, also, that in *The Nicanor* and *The Principe de Guinée* bounties were granted for slaves captured by the tender of *The Maidstone*, lying at Sierra Leone, at a distance of eight or nine hundred miles from the ship; and, in one case, I believe, by boats from the tender. In *The Fabiana* there were no slaves on board, and no bounties had been paid. In *The Nicanor* and *Principe de Guinée*, there was a special reference to the admiralty, which recognized the use of that tender, and it must be presumed to have been properly authorized. Those cases, moreover, were not referred to this court; and, therefore, whatever may have been done in them, if contrary to the letter or spirit of the law, will not justify me in exercising such a discretion.

[ \* 377 ] It is said, also, that no instructions under the \* treaty have been furnished to any tender but *The Black Joke*. The instructions under the treaty seem to be confounded in the act on petition, perhaps by both parties, with the orders or permission of the admiralty to employ tenders. Such employment is authorized, as I am informed, by official letters sanctioning the purchase or use of such vessels; and it is granted only for a limited number of such vessels, with reference to the service on which the ship is employed, the number of her crew, and other considerations of a public nature, by which the fitness and expediency of such a measure must depend. No such permission is alleged in support of this claim; and I am bound to pronounce that, taking the facts of this capture in any way in which they can be represented, either as a capture by *The Paul Pry*, or by the boat of *The Sybille*, it will not entitle *The Sybille* to the bounties claimed under the act of parliament.

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<sup>1</sup> See the Proclamations of 1824, 1825, and 1827.

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The Cognac. 2 Hagg.

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## COGNAC, Ewen.

February 15, 1832.

Though the Court of Admiralty has jurisdiction to reduce the premium on bottomry bonds, yet it must act, in the exercise of such power, with great caution, and take into consideration all the circumstances of each particular transaction.<sup>1</sup>

The registrars' and merchants' report, reducing the premium on a bond (given in France for a voyage to London) from 20 to 12½ per cent., overruled, but sustained where it disallowed a charge of commission for the unshipping and care of the cargo, at five per cent., as unreasonable, though agreeable to the custom of the place; and, in lieu thereof, substituted an allowance of five per cent. on the disbursements; and the court also sustained the report where it disallowed a charge for wages advanced to the crew abroad, on the ground that the payment might never have become due.

The Court of Admiralty, if required to enforce bottomry contracts, must proceed on principles of equity.

THIS question arose on a bottomry bond. In December, 1830, The Cognac, with a cargo of brandy, clover, and coriander seed, having sustained considerable damage in her voyage from Charente to London, put into the port of La Flotte, in the island of Ré, to repair. Her cargo was there unladen, the damage repaired, the cargo reladen, and the ship refitted and ready for sea in March, 1831, when the master, in order to meet the expenses, executed a bottomry bond on the ship, her tackle, apparel, furniture, and cargo, for the voyage to London. The bond set forth that "the master of The Cognac, assisted by the British vice-consul for the ports of the island of Ré, acknowledged the receipt of 24,170 francs, 57 cents, advanced to him by Messrs. L'Hermitte, Marsillacque & Co., merchants of Rochelles, for defraying the sundry expenses he had been at while at the said port, and so as he had been authorized by judgment from the tribunal of commerce,<sup>2</sup> he, the master, binding

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<sup>1</sup> [The Zodiac, 1 Hagg. 326; The Heart of Oak, 1 W. Rob. 215; The Ship Packet, 3 Mason, 255; The Hunter, Ware, R. 249; The Lord Cochrane, 2 W. Rob. 320, 336.]

<sup>2</sup> "We, the President of the Tribunal of Commerce of the isle of Ré, sitting at St. Martin, do certify that, by judgment of this tribunal, dated 19th March, 1831, Captain Ewen, of The Cognac, was authorized to borrow on bottomry, for discharging the expenses of his having put into the port of La Flotte, the sum of 24,170 francs, 57 cents, so as appears from the general account by M. Dechezeaux, his consignee."

"We further certify, that the custom of this place is to charge five per cent. upon the value of the cargo of foreign ships which put into this port."

••• The British vice-consul, after certifying that Ewen reported to him the general account of M. Dechezeaux, for the repairs of the vessel, the charges for putting into

himself to repay to the said lenders the said principal sum at the legal course of exchange at the time of payment, together with a premium of twenty per cent. for and on account of their risks during the said voyage, until twenty-four hours after the arrival of the vessel at \* London, the whole at the charge of the lenders."

[ \* 379 ] The bond set forth that the master consented to give the premium of twenty per cent. to avoid greater loss to the owners, either by fresh delays or by a sale of part of his cargo. The bond was signed, on the 21st of March, by Ewen, by the bondholders, and the British vice-consul, and attested by two notaries.

The ship, after a passage of ten days, arrived in the port of London; and the bond not being duly paid, an action, on the 14th of April, was entered against the ship and cargo in 1,400*l*.<sup>1</sup> On the 26th bail was given, so far as related to the cargo, which was then released, and the bottomry bond, with the accounts and vouchers, was referred to the registrar and merchants "to report thereon, and on the premium, and as to the amount due upon the bond." An appearance was afterwards given for the ship-owner; and, on his behalf, on the 9th of May, the validity of the bond was admitted, subject to the above reference. The ship was sold for 450*l*., and the amount of freight was 238*l*. 17*s*.

By the registrar's report, the sum of 1,265 francs and 55 centimes, paid to the crew on account of wages, was disallowed; also a commission on the value of the cargo; and, in lieu, a commission on the amount of disbursements on the cargo was allowed. These disallowances reduced the amount upon which the premium was to be charged, from 24,170 francs and 57 cents, to 17,110 francs [ \* 380 ] and \* 57 cents, being a difference of about 280*l*. The bottomry premium was also reduced by the report from 20 to 12½ per cent.

The *King's Advocate* for the bondholder. The registrar and merchants have reported that several items in the account should be disallowed; but the most essential point is, that the premium gua-

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port, and of the cargo, amounting to the above sum; and that he, Ewen, had been informed that at Nantes and Bordeaux the premium on bottomry bonds was twenty-five per cent., on account of the apprehensions of war; stated, "that the usual commission in the island of Ré upon sea averages was five per cent. upon the value of the cargo of foreign ships."

<sup>1</sup> The sum claimed by the bondholders was 1,160*l*. Proceedings against the ship were also instituted by the mariners for their wages, deducting the money advanced to them in France.

ranted by this bond should be reduced from 20 to 12½ per cent. In this particular case the precise amount of reduction is not of so much importance as the principle upon which it proceeds. Bottomry bonds are always favorably construed; and I know of no power in this court to compel a merchant abroad to advance money on bottomry at any stated premium. Where indeed fraud and collusion are imputed, then the premium may fairly be taken into consideration; it may also be a proper exercise of its jurisdiction, and there may possibly be a reasonable ground for its interference, in questions of this nature between British subjects, the vessel being at the time in a British port; but, where the hypothecation has been in a foreign port, I am not aware of an instance in which the premium on money advanced by a foreigner has been reduced; and the court itself, at the opening of this case, observed, that "to reduce the premium is a high act of judicial authority." In *The Zodiac*<sup>1</sup> consul's fees were charged in a bottomry bond and allowed, the fairness of the transaction not being questioned; and I contend that the equity on the part of the bondholder is much stronger in this case than in *The Zodiac*. The result of that and other decisions is, that a party objecting to a \* bond must show some good ground of impeachment. [\* 331] Here I assume that this bond is, in its general features, valid; there is no charge against the master either of fraud or even of imprudence or extravagance; nor is it alleged that the repairs were unnecessary, or that there was any erroneous calculation as to the disbursements. Indeed the accounts were certified abroad to be correct.

Having made these preliminary observations, I will now advert to the several items which have been disallowed, and I will consider them in order. It is said, that wages paid to seamen abroad cannot form an item in a bottomry bond; it, however, appears singular to me, in a case of seamen detained for upwards of three months in a foreign country, that the master should not have the power to take up money, in order to make them an advance, to be allowed to him in account; and this only, because, as is alleged, that the mariners' contract is not to be enforced till the end of the voyage. Are the men in the meantime, and for an unexpectedly protracted voyage, and during a severe period of the year, to be left perfectly destitute? The master, in this case, had no funds, no personal credit, and yet is he not to have the power to charge the ship with that which is a primary lien upon it, and for which it is responsible in priority to all

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<sup>1</sup> 1 Hagg. Adm. Rep. 320.

other claims? And here the advances were sanctioned by the tribunal of commerce. But, however this may be, the bondholder is not bound to look to all the disbursements. If this court were to disallow these advances, it would be an interference with the decision of a foreign tribunal; and the payment having been made under [ \* 382 ] the direction and sanction of the court where the \* vessel then was, it obviated the necessity of a sale of cargo, and ought now to be supported.

The next item is the disallowance of the commission charged for the care of the cargo, which was unladen and deposited in warehouses, and for having reshipped it. What has the lender to do with this charge? He is not to look to the disbursements. If, indeed, the merchant who lends the money is also the shipwright and does the repairs, or even superintends them, a suspicion possibly may arise should the commission be excessive; but the matter of commission will depend on the custom at the foreign port; and how can this court pronounce that such a custom, which is proved to prevail, is vicious, and not to be sustained? What authority can it have to control the usage of a foreign port? That such is the usage is denied, I am aware, in the act on petition; but the certificate of the British consul is directly opposed to such denial. In this case the cargo, at least the clover and coriander seed, would be easily affected by leakage; and when unladen, required particular attention and care to prevent injury by damp; and the charge of commission for this service and the responsibility attendant upon it is disallowed, because the registrar and merchants have thought 5 per cent. on the actual disbursement sufficient.

But the most material feature of the report is the reduction of the premium on the bond. It is said, that an insurance on the voyage home could have been effected at 1 per cent.; but the rate of insurance depends upon the condition of the vessel, which, after her damage, could not be exactly known in this country. How- [ \* 383 ] ever, supposing such \* an insurance could have been effected, it has nothing to do with this question; for if it had, on what ground is 12½ per cent. allowed? Where there are a number of transactions 1 per cent. may, on an average, be sufficient to cover the risk, but would not suffice for a single and insulated transaction. Bottomry bonds, however, are to be upheld on general principles, which are peculiarly applicable to them alone. Here is no imputation of fraud; the difficulty of procuring money was great,—there was an apprehension of war; and as much as 25 per cent. was demanded by other merchants; the bond was executed with the sanction of the British consul, and of the tribunal of commerce. Can

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The Cognac. 2 Hagg.

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this court, then, determine that the bondholders ought to have advanced their money at a lower rate of interest? How is it to adjudicate safely upon such a matter? If bonds of this nature are to be shaken on minute considerations, it will be greatly detrimental to the interests of commerce; and what impediments will be thrown in the way of obtaining advances on bottomry, if foreign merchants are to be compelled to submit to the views and notions of the registrar of this court assisted by British merchants? On these grounds, I submit that the report cannot be sustained; the accounts have all been allowed, and there is no attempt to impeach the *bona fides* of the transaction in any part.

*Addams*, for the owners of the cargo, observed, that the accounts could not be impugned, because the master had absconded; that *The Zodiac* was inapplicable, the vessel, in this case, being within an easy communication of this country.

*Dodson* for the owner of the ship.

\* JUDGMENT.

[ \* 384 ]

SIR C. ROBINSON. This is a question relating to the reduction of the premium of a bottomry bond, under the following circumstances: The ship, belonging to persons in the north of England, was chartered to go to Charente, in France, and bring a cargo of brandy to London. The brandy was laden, and the ship sailed on the 25th of December, 1830, and met with bad weather in the Charente river. The storm continued when she got out to sea, and she became leaky, and was obliged to put into the Isle of Ré, which is not far from the mouth of that river. The cargo was unladen and warehoused, and the ship surveyed under the superintendence of M. Dechezeaux, who had been adopted by the master as the ship's agent. Great repairs were found to be necessary, and were accordingly effected in the months of January and February. In March the cargo was reshipped. The vessel sailed in the latter end of that month, and arrived in London in April. In order to discharge the expenses which had been incurred at the Isle of Ré, the master took money on bottomry to the amount of 24,000 francs. The expenses amounted to about 18,000 francs, and a sum of 6,000 francs was charged as a commission of five per cent. on the value of the cargo; making up the total sum of 24,000 francs, for which the bond was given. When the bond was put in suit in this court, the payment was resisted; and the parties, by a private minute of court, but



[ \* 385 ] without direction from the court,<sup>1</sup> agreed to refer \* the accounts generally to the registrar and merchants, to report on the premium and the several charges. The report of the registrar and merchants has disallowed a sum of 7½ per cent. on the premium, a sum of 1,200 francs paid as two months' wages to the master and crew during their detention, in addition to their subsistence,<sup>2</sup> and the commission of five per cent. charged by the agent on the value of the cargo, allowing a commission of five per cent. instead of three per cent. on the repairs of the ship, and the other expenses. And an objection to these disallowances being taken on the part of the bondholder, it is for the court to express what it considers to be the principle of law applicable to the several points.

In the act on petition, the owners rely principally on the report, and allege that it was made on a full hearing of every thing that could be advanced, and that the court has the power of reducing exorbitant charges, and that the disallowances were properly made. On the other hand, it is alleged that the money was advanced by the lender on a contract perfectly fair, and that the lender is not answerable for the application of the money; that money could not be obtained at a lower premium, owing to the disturbed state of commerce in France, and the scarcity of money, and also on account of apprehensions that were entertained at that time of the breaking out of hostilities between the two countries. In the argument a higher principle has been advanced; and it has been contended that, although there may have been some few instances in which the premium has been reduced, in cases between British subjects,

[ \* 386 ] this court \* has no authority to disturb the terms of the agreement between the parties in a case like the present, relating to a contract of this description in a foreign country, on which the foreign merchant has lent his money with perfect good faith; and that the court has not authority to reduce the premium on a bottomry-bond, unless specifically affected with fraud and collusion, which must be shown, and proved in a clear and distinct manner. This is almost a denial of the jurisdiction of the court, which it is proper I should notice *in limine*; and I will take this opportunity of stating what I conceive to be the authorities of law on this subject.

In *The Zodiac*, which has been cited, my predecessor held that

<sup>1</sup> The Court intimated that it would be convenient, in cases where the legal effect of a bottomry bond was intended to be questioned, that the reference to the registrar and merchants should be made under the court's directions.

<sup>2</sup> The expense of victualling the crew was allowed.

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The Cognac. 2 Hagg.

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such a power must exist in principle, though it had not been often exercised, and he did not see reason to apply it in the case then under consideration; and I conceive there is no want of authorities for such a practice, when the subject is fully considered. Writers on maritime law treat generally of the contracts of *respondentia* and bottomry, under the same head, with very little discrimination, as they are similar in their principal character of maritime risk and interest, and are so considered together in countries where contracts of *respondentia* still exist. In this country, that description of bottomry has been disused since the passing of 19 Geo. II. c. 37; and, therefore, we are not so much in the habit of illustrating the one by the other. But if it is considered that *respondentia* bonds are entered into on far more advantageous terms between the contracting parties, who know each other, and may be able to judge for themselves of the state of the money-market, and of the risk and profits on which money so employed might be advanced, whilst in \*bot- [ \*387 ] tomry by the master, like the present, the owner is usually ignorant of all that passes, and the master has no other authority to pledge his property than what is derived from the necessity in which he is placed. The general principles on which courts of justice have thought it reasonable to give relief against extortionate bargains in the former class of cases, are as fit to be entertained and applied, in proper cases of this class; and I think I may refer to the principles that have been held distinctly with regard to *respondentia* bonds, as authorities equally just and necessary to be applied to cases of this description.

These contracts have always been considered free from the restraints proceeding from laws against usury,<sup>1</sup> and have been held to depend chiefly on the agreement of the parties.<sup>2</sup> But this is not to be understood without limitation; for they are still subject to the restrictions imposed on all contracts by the principles of good faith.

M. Emerigon<sup>3</sup> cites, without \*disapprobation, a passage [ \*388 ]

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<sup>1</sup> See Pothier, vol. iii. p. 85. Also Sir W. Jones's observations upon these contracts in the Laws of India. Asiatic Researches, vol. i. p. 428. See also Colebrooke's Digest of Hindu Laws on Contracts and Successions, tit. Interest, vol. i. pp. 29, 81.

<sup>2</sup> Valin, (vol. ii. p. 2, liv. 3, tit. 5.) after stating that the ordinary peace rate of premium on *respondentia* in France, in his time, was from fifteen to twenty per cent. on a voyage to the West Indies or to Canada; from twenty-five to thirty-five per cent. to the coast of Guinea; and in the coasting trade from five to ten per cent., adds, "Mais en temps de guerre il est à un taux plus fort, proportionnellement aux risques et aux circonstances; car enfin il n'y a rien de réglé sur cela, et la quotité de profit maritime dépend moins de l'usage courant du lieu, que de la convention des parties."

<sup>3</sup> Vol. ii. 407.

from an older Italian writer, to this effect — “that if the premium is excessive, it may be moderated by the judge.” In the practice of the Court of Chancery, “that court will not assist the obligee of a bottomry bond when it carries an unreasonable interest :” “the reasonableness or unreasonableness of the interest depends upon the risk.”<sup>1</sup> In the same manner, the power which this court exercises in cases like the present does not rest on any direct authority which it assumes over a foreign contract, but on the principle common to all courts, which restrains them from lending their aid to enforce contracts essentially vicious, or tainted with fraud or extortion. Lord Hardwicke, in one case, on contingent or hazardous contracts,<sup>2</sup> in which reference was made incidentally to the principle of bottomry, discusses at length the effect of fraud and extortion, and assimilates them together : “To take advantage of another man’s necessity is,” he says, “equally bad as taking advantage of his weakness, and in such situation he is as incapable of making a right use of his reason as in the other : and fraud has been constantly presumed or inferred from circumstances and conditions of the parties ; from weakness and necessity on one side, and extortion and avarice on the other ; and merely from the intrinsic unconscionableness of the bargain.” When it is admitted, therefore, that fraud or collusion might justify the interference of this court, we must take those terms with the extension given to them in other courts ; and if this court [ \* 389 ] is “required to enforce contracts of this kind at all, it must be on such principles as equity demands, and without which neither equity nor justice would be done. We have then, I think, sufficient authority for the exercise of this jurisdiction, on the same principle, in all cases, foreign as well as domestic. Even commercial writers<sup>3</sup> have noticed the liability of lenders on bottomry to have the terms of their contracts examined in the courts which are called upon to adjudicate upon them. It cannot be said, therefore, that there is any surprise on foreign merchants in the application of such principles ; and it must be understood, as they do undoubtedly understand, that if they require the aid of this court to enforce contracts made inten-

<sup>1</sup> See 1 Eq. Cases, Abr. 372, and cases there cited.

<sup>2</sup> *Chesterfield v. Jansen*, 1 Atk. 352.

<sup>3</sup> Magens, in his work on Insurance, (vol. i. p. 400,) mentions the case of a suit in the Court of Admiralty in 1741, on a bottomry bond given in Carolina, in which the payment was resisted in respect to certain articles. The case was compromised ; but the writer observes, with reference to the expediency, in so terminating the suit, “that the party might have been required to show that no one else would have advanced the money on bottomry on cheaper terms.”

tionally to be enforced here, such aid can only be afforded according to the principles which guide its proceedings, and without which it would be an instrument of fraud and rapine, rather than the dispenser of justice.

I have said thus much as to the power and authority of the court, to prevent any misunderstanding on a point of so much importance; and I now proceed to what is the more immediate question in this case—how far that power ought to be exercised in the several articles that are in issue in this report.

The premium was reduced from 20 per cent. to \*12½ per [ \*390 cent., on a calculation, as I am informed, that on an allowance of 2½ per cent. for insurance and the expenses of effecting it, 2½ for agency to receive and remit, and 2½ for ordinary interest for six months, there remained a profit of 5 per cent. for the sea-risk; and the surplus was reduced as excessive. I will not take upon myself to say that this calculation might not be, under some circumstances, reasonable and liberal; but I am to examine the contract as it stands, with reference to a particular time, and to the special circumstances under which it was formed. It is described as a high premium in the bond; and the reason assigned in the correspondence is, that money could not be obtained at a lower premium, owing to its scarcity in France, and the disturbed state of the country, and the apprehension of hostilities between the two countries. On a reference to the public journals of that time, I find that representation to be confirmed by the daily news, and by the state of the funds both of this country and of France. If such a cause really existed, it is reasonable to suppose it might operate on the minds of the parties; and I cannot go the length of saying that the fairness of the transaction may not very materially depend on that consideration.

The act on petition alleged that communications had been made to the owners in London, or their agents, of all that was passing in France, and that correspondence has since been brought in. It appears from it that M. Dechezeaux duly informed the owners on the 29th of December of the accident, and in January and February repeatedly urged on them the expediency of providing funds in London, advising them of the sums required, and of the impossibility of obtaining money in \*France at a less premium [ \*391 ] than twenty per cent. The owners here took no measures, till in the month of March instructions were given to a house at Rochelle to procure funds; and the answer to that letter of the 16th of March, advises them that the money had been taken on bottomry at sixteen per cent. This appears now to have been incorrect; but the observation which I found upon it is, that it seems to have

excited no remark as to the exorbitant rate of such interest, though much higher than the rate allowed in the report. Surely these facts tend strongly to exonerate the agent and the lender from any imputation of clandestine collusion. They likewise supply the best proof which the court can have of the fairness of their conduct, and perhaps they go further, and furnish some test of the state of the money-market both in England and France; for although it might be difficult for the different owners and insurers to adjust their several shares in the funds required, in the way of immediate contribution, it should be remembered that money might have been raised on bottomry in London as well as in France; and if it was not so raised at a lower interest, it may be inferred that the terms of this bond were justified by the circumstances of the times. In such a case, how can I say that the bond is affected with fraud or collusion, or with the vice of extortion? Though I might have expected that money might have been advanced at a lower rate, and particularly when I see that in *The Gratitude*,<sup>1</sup> in time of open war, the premium between Lisbon and this country was only sixteen per cent. — yet I cannot [ \* 392 ] act on that supposition, to the effect of saying that the premium actually stipulated for in this case was excessive, so as to authorize this court to reduce the rate, which would only exercise such an authority on clear and indisputable grounds. Considering the caution with which it behooves the court to act in such questions, I cannot venture to form any such conclusion. I therefore overrule the report of the registrar and merchants on this point.

In respect to the commission of five per cent. on the value of the cargo, I shall not enter into the alleged custom of France on this point. Such a custom of a particular country would have very little effect against foreigners, unless it is reasonable and just. To sanction a charge of five per cent. on a whole cargo, of whatever bulk or value, for such services as these, cannot, I think, be deemed reasonable or just. It is, indeed, a reflection of the intelligent writer to whom I have before alluded,<sup>2</sup> “that all customs of merchants are not founded on right principles; and, though become respectable by antiquity, that they should not avail in any suit of law, so as to outweigh the scale of right reason.” This commission is manifestly a very high charge, not limited to the necessities of the case, and on that ground it is not capable of being sanctioned and allowed by this court. In *The Gratitude*, the commission of five per cent. was charged only on the advances. Whatever, then, may be the reliance

<sup>1</sup> 3 Rob. 240.

<sup>2</sup> See *Magens's Preface*, pp. 4, 5.

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The Prince Frederick. 2 Hagg.

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of foreigners on their own customs, they can only obtain, by the aid of this court, such relief as is compatible with the principles of law administered here. On this point, the registrar and merchants have acted in conformity to the principles which \* have [ \* 393 ] always guided the decisions of this court, and I confirm that part of their report. I confirm also the disallowance of wages paid before the termination of the voyage, and in addition to the subsistence allowed during the detention, on the ground that it was a premature payment that might never become due; and if paid in this form, might fall, as it has done, on the owners of the cargo, who are not properly liable to it.

The court directed the report to be reformed, by allowing the original premium of twenty per cent., and in all other respects confirmed the report.

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On the 19th of February, the amended report, certifying that 821*l.* 6*s.* 4*d.* was due to the bondholders, was brought in. An appeal was asserted on the part of the bondholders; but, on the 28th of May, it being alleged that the appeal would not be prosecuted, the amended report was confirmed.

*Addams* then prayed that the consignees of the cargo be dismissed on payment of the balance of the report.

The *King's Advocate*, *contra*, applied for interest and costs.

An act on petition was afterwards entered into in support of these respective prayers; and on the 6th of July the court, agreeably to the petition on the part of the bondholder, pronounced interest at the rate of four per cent. to be due on the amount of the bond, from the time the same became payable, to the 15th of February, being the date of its decree, and with costs.

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\* PRINCE FREDERICK, Hart.

[ \* 394 ]

February 24, 1832.

Ship's articles are only conclusive as to the amount of wages and the voyage. On collateral points the Court of Admiralty may consider how far they are reasonable and just; <sup>1</sup> there-

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<sup>1</sup> [Brown v. Lull, 2 Sumn. 443; The Juliana, 2 Dod. 504.]

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fore, a clause, providing that if contraband goods were found in the fore-castle, the seamen living therein should forfeit their wages and 10*l.*, is not conclusive to work a forfeiture of wages against those not directly proved to be personally implicated in the offence. The penalty cannot be enforced in the Court of Admiralty.

THIS was a suit for seaman's wages, on a voyage from London to Rotterdam and back. The owner gave in a defensive plea,<sup>1</sup> alleging that on the day after the arrival of the ship in the port of London, a custom-house officer found, and seized as contraband, in the fore-castle, being that part of the ship appropriated to Powell, (and three other seamen by name,) twenty-two pounds of tobacco, which belonged to the said four seamen; that Powell had declared to one Turner, with whom he lodged, that he had taken one lot of [ \* 395 ] contraband goods \* away from the ship, and that there were twenty-five more parcels; that in consequence of such contraband being so found, Powell and the remainder of the crew had forfeited all the wages to which they would otherwise have been entitled.

*Addams*, for the mariner, opposed the allegation.

*The King's Advocate*, *contra*.

## JUDGMENT.

SIR C. ROBINSON. This is a case of wages, on the suit of Adam Powell, (but affecting others, as it seems now proposed to fix the principle, involved in this allegation, upon others of the crew,) in which the owners have pleaded a cause of forfeiture on the ground

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<sup>1</sup> The ship's articles were annexed. After the usual clauses, was a clause, in print, which contained the following extracts:—"And we, the undersigned seamen and mariners, do further severally agree, that, in case of any smuggling or illicit transactions on board, in which any one or more of us shall or may in any manner whatsoever be concerned, or which shall take place by or through the culpable negligence or wilful misconduct, or want of reasonable care on the part of any of us respectively, we shall and will be content to forfeit all such wages as may be due to us respectively, and a further sum of 10*l.* by each and every one of us to the owners." "And further, we, the seamen living in the fore-castle, do hereby agree, and are content, to be subject to the like forfeitures, in the event of any contraband or prohibited goods being found in the fore-castle by the officers of the customs in England, beyond the quantity allowed as sea-stock." Then followed a clause, in writing:—"In the event of any contraband or prohibited goods being found on board the said vessel, by any revenue officers, beyond the quantity allowed by law as sea-stock, we shall and will be content to forfeit all such wages as may be due to us respectively, and a further sum of 10*l.* by each and every one of us to be paid to the owners."

of smuggling, and it is so pleaded as a fact provable against Powell. There is no objection to an allegation of such a fact on the general principles of maritime law ; but the allegation goes on to plead the ship's articles, and two particular clauses of that instrument, which stipulate that the wages of the seamen shall be forfeited on the mere finding of prohibited goods in the ship, and more especially in the fore-castle, which is appropriated to the use of the sailors, and where, it is alleged, such articles could not be stowed away without the knowledge and privity of all individuals having access to that part of the ship. This may properly affect Powell in conjunction with the pleading of the fact ; and as to him it is not denied that the allegation is admissible. But, as to the three other seamen, it is only pleaded, "that, in consequence of the contraband goods being found in the fore-castle, Powell, as also the remainder of the crew, have forfeited all their wages."

\* The opinion of the court is requested on the effect of the [ \* 396 ] special clauses as to such a forfeiture, in the ship's articles, in order to save the expense of further proceedings ; and I am clearly of opinion that I could not pronounce for a forfeiture of wages on such clauses alone, unsupported by any proof of the fact against the individuals. I will explain the grounds of this opinion, which is founded, I conceive, on the intrinsic injustice of the principle contended for on the part of the owners, as well as on the act of parliament, and the authority of adjudged cases.

With respect to the first point, it is sufficient to say that it is not impossible, however little to be suspected, that prohibited articles might be secreted there without the sailors' knowledge, by the master himself or his officers ; and the bare possibility of such a fact would prevent the court from drawing any conclusive inference against any individual from the force of the articles alone. As to these incidental additions to the ship's articles, it is to be recollected that this instrument is required by the 2 Geo. II. c. 36, for the protection of the owners, on the specification of the wages, and of the voyage, with respect to which the articles are conclusive. But on other collateral agreements it has been decided by my predecessor, in the case of *The Minerva*,<sup>1</sup> that they are not in all cases conclusive ; but that this court may, as a court of equity, consider how far such clauses are reasonable and consistent with justice, bearing in mind the general ignorance and imprudence of seamen, and their inability to understand the meaning of a \* long and multifarious instru- [ \* 397 ]

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<sup>1</sup> 1 Hagg. Ad. Rep. 347.



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The Prince Frederick. 2 Hagg.

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ment, as the ship's articles are made by these additions. This principle has been adopted by Lord Tenterden, without dissent, in his Treatise on Shipping;<sup>1</sup> and the concurrent opinion of two such persons justifies me in holding that this clause, *ex vi termini* alone, is not obligatory and binding on the court. On precedent, also, — in the case of *Thompson v. Collins*,<sup>2</sup> which has been cited by the King's Advocate, the Court of Common Pleas had occasion to consider the effect of an embezzlement not proved against any individual; and the court was there of opinion that such a principle could not be pressed to the forfeiture of wages from a mere clause in the articles making that fact a cause of forfeiture, without proof of the fact against the individuals; and although the court, in intimating this opinion, permitted the question to be argued more fully, if the counsel should desire it, the party acquiesced, and the point was not again brought forward. In that case the principle contended for might be less inequitable even than the present; because there are traces in ancient ordinances of rules by which a loss of freight, occasioned by loss of goods, was held to affect the seamen by a proportionate deduction of wages.<sup>3</sup> But here no loss is alleged to have been sustained by the owners, and I presume the ship would not be affected by such an act, without proof or presumptive inference against the owners or master; at least, such was the ancient [ \* 398 ] principle, for the 38 Edw. III. c. 8, enacts, "that \* an owner shall not lose his ship for a small thing put within the ship not customed, without his knowledge." It would, therefore, be inequitable to act on a different principle against the mariners.

It is to be observed, also, that the same clause in the articles imposes a penalty of 10% on each seaman in addition to the forfeiture of wages; this penalty could not be enforced in this court; and it suggests to the court the duty of not putting such a penal construction on the operation of the condition respecting wages, when the owner may, if he is so advised, enforce the whole clause against the seamen by the authority of a court of common law. I shall therefore not hold the articles alone conclusive to work a forfeiture of wages against any individual who is not alleged and proved to have been personally implicated in the offence. The allegation must be reformed, therefore, so far as it implicates any seaman except Powell.

NOTE. The owner paid the wages and costs.

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<sup>1</sup> 5th ed. p. 435.

<sup>2</sup> 1 Bos. & Pull. N. R. 347.

<sup>3</sup> For a claim of deduction from wages on account of damage to goods by negligence, see *The New Phoenix*, p. 420.

## PUBLIC OPINION, Ackland.

April 18, 1832.

In a cause of collision happening in the Humber, twenty miles from the main sea, but within the flux and reflux of the tide, and at about three fourths flood, the protest of the defendants sustained upon proof that the site was *infra corpus comitatûs*.<sup>1</sup>

THIS was a cause of damage by collision in the river Humber, brought by the owners of The Royal Charter mail-packet against The Public Opinion, passage boat. An appearance was given for The Public Opinion, under protest, on the ground that "the site of the collision was within thirty yards of the west pier, at the entrance of the Humber dock basin, in the parish of the Holy Trinity, in the \*south ward of Myton, in the town and county of Kings- [ \* 399 ] ton-upon-Hull, twenty miles up the river Humber; and that therefore the collision did not take place on the high seas, but within the body of a county." It was alleged on the other hand, "that the site of the collision was about thirty yards from the outer end of the western pier of the port of Hull, within the flux and reflux of the tide, which was, at the time of the collision, about three fourths flood, and within the admiralty jurisdiction."

The treasurer of Hull stated, from his knowledge as chief clerk to the guardians of the poor, that "beyond the line of the low-water mark the Humber was considered as a branch or arm of the high sea, and not within the town of Hull, and, consequently, not capable of conferring a settlement."

The affidavit of a sheriff's officer, stated, "that he was in the habit of executing warrants upon civil processes, and making arrests in civil actions upon such part of the Humber as he considered to be within the jurisdiction of the sheriff of Hull; and that he had always understood such jurisdiction to extend from the fore-shore of the river within and adjoining to the town to the middle stream of the river; but that, in 1828, it was intimated to him by the magistrates, that he could not arrest beyond low-water mark."

The master of The Royal Charter stated, that "The Royal Charter was first struck at the distance of about thirty or forty feet from the west pier, and beyond the line of ordinary low-water mark of the

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<sup>1</sup> [Otherwise in the United States. *Waring v. Clarke*, 5 How. 441.]

Humber; that the place, where The Royal Charter was at [ \* 400 ] the time she was forced against the \* west pier, is usually covered with water at low-water; but that at spring tides the water recedes from the shore to the distance of about ten or fifteen feet, leaving the mud in front of the west pier."

It appeared, from a pilot's affidavit, that the width of the Humber between Hull and the opposite coast was about three miles, and that a person on the shore at Hull could not distinguish what was doing on the opposite shore; that the river was navigable beyond Hull, not only for merchant vessels, but for men-of-war; that there was no bridge across the Humber, but that it was navigable throughout, extending from the sea westward to the junction of the Ouse and Trent, being about forty-two miles; the town of Hull being half way; that the first bridge on the Ouse was at Selby, and on the Trent at Gainsborough.<sup>1</sup>

[ \* 401 ] \* *Addams*, in support of the protest, contended that the damage was done *infra corpus comitatus*.

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<sup>1</sup> An inquisition, and also a charter to the town of Hull, (from the tower records,) contained the following extracts.

"It was found by the inquisitors upon oath, that Richard, Earl of Arundel, and Alianor his wife, have and hold a certain passage over the water Humber, at Barton-upon-Humber, with the profit of the same passage, as in dower of the same Alianor, the reversion of the same passage belonging to John, son and heir of Henry de Beaumont, within age, and in the custody of the lord the king; and that they say, that they and all other lords of the town of Barton, from time whereof the memory of man is not to the contrary, have had, and were accustomed to have any passage over the water aforesaid within the limits of Redeclyf and Twygrayn before these times; save that at Barrow haven, within the limits aforesaid, there is and for all time was a certain easement for the tenants and men of the town of Barrow, for themselves, their goods, and merchandises over the water of Humber, to be taken from thence at their will, at their own costs to be carried, and thither to be brought without any toll or custom to be paid to the lords of Barton."

"Desiring the bettering of the said borough, which is situate upon the water of Humber, which is an arm of the sea, and which is now inclosed, and considering, from the good and secure keeping of the same borough, the defence and safety of our people of parts adjacent against the attacks of foreigners on the sea-coasts and elsewhere may many ways happen; and also that the burgesses may more quietly attend to their affairs, and the business of us and of our heirs be more properly effected in time to come; and, moreover, of our more abundant favor we have granted, as much as in us is, to the mayor, bailiffs, and burgesses of the said town of Kingston-upon-Hull, and to their heirs and successors, that they shall have a port for ever annexed to the said town liberty thereof, from Sculcote Gate unto the middle course of the water of Humber."

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The Public Opinion. 2 Hagg.

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The *King's Advocate, contra*. That the Humber was described as "an arm of the sea;" and that the admiralty jurisdiction was consequently not excluded. He referred to the case of *The Pearl*.<sup>1</sup>

JUDGMENT.

SIR C. ROBINSON. The court is called upon to decide against its own jurisdiction; and although that is not a very pleasant duty, it must be discharged with fidelity and candor according to the rules of law which are applicable to the subject. The court must do this on public grounds, and also with reference to the interests of parties, who may be affected by the distinction. It appears incidentally that the owners of *The Public Opinion* are become bankrupt; which may be the reason for proceeding here against the vessel, and may involve a question of interest, as to the priority and preference of these parties, against the ship over the general creditors.

Since the statutes of Ric. II.<sup>2</sup> and of Hen. IV.<sup>3</sup> it has been strictly held, that the Court of Admiralty cannot exercise jurisdiction, in civil cases, on causes of action arising *infra corpus comitatus*; and in a very recent case the Court of King's Bench has issued a prohibition in a case of collision, in which *The Lord of the Isles*, a steamboat, was charged with damage to a merchantman in the Solent Sea, running between the Isle of Wight and the Hampshire coast.<sup>4</sup> That place is, then, nearer to the main sea, and has more the appearance and general character of sea than the present. Hull is twenty miles from the sea, and invested with a special local jurisdiction, which reaches beyond the spot where this injury is alleged to have been done. It is the seat of numerous mercantile contracts and transactions, some of which might perhaps be brought within the verge of this court, if its jurisdiction should be established in this case; the wages of seamen or boatmen in the passage navigation might be of that kind; and many consequences might follow, which might interfere with the course and habits of trade as they have hitherto prevailed.

The general characteristics of inland waters belong strongly to the place of action. It is twenty miles from the main sea, very near to the land of Yorkshire, and not above three miles from the Lincolnshire coast; and, therefore, not beyond the reach of sight and the

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<sup>1</sup> 5 Robinson, 224.      <sup>2</sup> 13 Ric. II. c. 5; 15 Ric. II. c. 3.      <sup>3</sup> 2 Hen. IV. c. 11.

<sup>4</sup> [*Rex v. 49 Casks of Brandy*, 3 Hagg. Ad. R. 275; See *Waring v. Clarke*, 5 How. Sup. Ct. R. 441.]

ordinary cognizance of juries. No case has been found to [ \* 403 ] support such \* proceedings; and, I think, I can venture to say, none has occurred within a pretty long experience, which I have had in the practice of this court. The case which has been mentioned relates to the termination of a sea voyage, and in no manner affects this question. The documents which have been exhibited show that this part of the river is within the recognized territory of the county; and, as such, subject to the process of the courts of common law. I feel, therefore, that it is my duty not to adventure beyond the known limits of my authority; and I should only involve the parties in expense and disappointment, were I to encourage any such experiment. I therefore dismiss the suit; but I do not think it a case for costs.

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### THE AMPHITRITE, Morgan.

May 2, 1832.

A mariner quitted a vessel in defiance of the master, with approbrious language; and, without any declaration of such intention when he quitted the vessel, entered on board a king's ship within twenty-four hours, — this is desertion, working a forfeiture of wages.

A clause in the articles, to the effect that mere absence for less than twenty-four hours shall not be deemed a desertion, relates to occasional absences, and not to a wilful denial of authority.

THIS was a case of mariner's wages. The seaman, Forsyth, was hired on a voyage from London to Rio Janeiro and back. In his summary petition he alleged, that, at Rio, on the 19th of September, he quitted The Amphitrite for the purpose of entering into the service of H. M. S. Beagle, Captain Fitzroy, which he accordingly did on that day, and was thereupon rated in the ship's books as an able seaman from that day. The evidence consisted of the answers of Morgan, (the late master of The Amphitrite,) on the summary petition, and of extracts from the log, annexed to his affidavit.

[ \* 404 ] The answers stated, that it was not on the 19th \* (as pleaded inaccurately,) but on the morning of the 25th that Forsyth deserted.

*Addams*, for the mariner.

The *King's Advocate*, *contra*.

## JUDGMENT.

SIR C. ROBINSON. I have some reason to regret that this case has been brought on without any statement of the facts put in issue in the form of an allegation: it rests entirely on the answers of the master, and on the entries in the log, which are scarcely intelligible without a specification of the particular entries relied on, and without some intimation of the points to which they are intended to be applied. And it is with difficulty that I have been able to collect what is the real question between the parties. It now appears to depend, chiefly, on the entry of the 25th of September, which imputes to the man a wilful and contumacious refusal of duty, and a quitting of the ship not only without leave, but in defiance of all authority. The vessel arrived at Rio on the 19th; disagreements there arose; and there are entries in the log of a refusal to work on the 23d and 24th, which was highly reprehensible, and of the man's dissatisfaction with the ship's provision, which was made a formal complaint to the commander of H. M. S. Adventure, then at Rio, and was reported, upon inspection by his officers, to be groundless. If the bread had not been good, it would not have justified such behavior, as it was his duty, as a seaman, to work as long as he remained on board the ship. It is said, however, that he had returned to his duty on the 24th, and was permitted to work, which implied a \*forgiveness of his former disobedience. [ \*405 ] That would be an indulgent interpretation of his behavior; but it is unnecessary to consider strictly the effect of it, as the following entry on the 25th describes a much more violent and contumacious act of disobedience, on quitting the vessel in defiance of the master, and with these opprobrious expressions:—"There, d—n you; we have now done you." These words import malice and resentment, and imply that he thought he had done some injury to the master. Could any thing be more inconsistent with the duty of obedience and faithful service than such conduct? It is not pretended that he ever returned to his duty, or that there was any reconciliation or remission of this behavior.

But it is said that the mariner entered on board H. M. S. Beagle within twenty-four hours after leaving the merchant vessel, and that such entry will bring him within the protection of the 2 G. III. c. 36, s. 13, which provides, "that entry on board a king's ship shall not be deemed a forfeiture of wages." In order to bring the case within the benefit of this clause, it is contended that a *bonâ fide* leaving the ship with the intention of entering was equivalent to entry, and that the articles of the merchant vessel stipulated, in effect, that mere absence for less than twenty-four hours should not be deemed desertion. Such a clause, I conceive, relates to occasional absences,

## Two Piratical Gun-Boats. 2 Hagg.

which are frequent in the carelessness, idleness, and intemperance, in which sailors indulge in port; but it cannot be extended to such a wilful denial of authority and refusal of duty, as is described in this entry of the log; and as to the claim of twenty-four hours, to take off the consequences of such wilful insubordination, by a [ \*406 ] \* subsequent entry on board a king's ship, it is quite inconsistent with any reasonable construction of such a privilege.

I could assent to the proposition, that a *bonâ fide* declaration of an intention to enter might be considered as entry for some purposes, as if a mariner was prevented from entering by the act of his master; but the *bona fides* is the main part of that proposition which cannot be applied to such conduct as this. It cannot be imagined, that any privilege conferred upon a man for entering into the king's service should be intended to encourage him to defy his master, and commit all possible acts of disobedience under the cover of a subsequent entry. Such conduct is not a *bonâ fide* entering into another service, which ought to be made without prejudice to his duty and service to his former master. To suppose that a man should have twenty-four hours to put a color on such misconduct, by which the vessel might even be lost in the meantime, is quite inconsistent with the obligation of faithful service contracted to his former ship; and I cannot accede to such a proposition. In what was done the next day, when the lieutenant of The Beagle went for this man's clothes, and returned without them, that officer seems to have acquiesced in some degree in the construction put on the act of desertion by the master, who at least appears to have acted consistently from the first in his opinion of the man's misconduct. Looking to the effect of the acts now proved to have been committed, and not afterwards discharged by subsequent reconciliation and forgiveness, I think the mariner is not entitled to wages for a service so terminated by his own misconduct; and I dismiss the suit.

[ \*407 ]

## TWO PIRATICAL GUN-BOATS.

July 6, 1832.

Bounties for the capture of pirates, made by boats detached from a king's ship, at a distance of some miles from the ship, but not out of signal distance, are distributable among the whole ship's company.

THIS was a question relative to the distribution of bounties on the capture of pirate vessels, — whether the bounties enured to the whole ship's company, or only to the actual captors ?

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Two Piratical Gun-Boats. 2 Hagg.

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The *King's Advocate* and *Dodson*, for Captain Pellew, and the officers and men of *The Revolutionnaire*.

*Phillimore* and *Addams*, for the actual captors.

## JUDGMENT.

SIR C. ROBINSON. This is a question respecting the distribution of bounty-money given by act of parliament for the destruction of pirates; and it is simply this, whether, the capture being effected by two boats' companies detached from *The Revolutionnaire*, the bounty belongs to those individuals exclusively, or to the whole ship's company? The ship was at anchor in the port of Zante on the 18th of May, 1821, when intelligence was received that two piratical gun-boats were committing acts of depredation on the opposite shore, near the entrance of the Gulf of Patras, and had actually plundered and ill-treated two fishing-boats belonging to Zante. Two barges, manned with forty-three men from *The Revolutionnaire*, and victualled for three days, were despatched in pursuit of them: they were so despatched at sunset of the 18th, and on the following morning they rejoined the ship, having completed the service on which they were sent, \* and taken and destroyed the piratical boats, after a severe contest and very gallant attack, — at a distance of ten or fifteen miles from the ship,<sup>1</sup> but not apparently out of sight or signal distance, except owing to the intervention of a headland. The boats were condemned in this court, in 1829, to *The Revolutionnaire* generally, on affidavits, principally of Lieutenant Morell, setting forth the facts of the capture and the number of the pirates, as they are now pleaded: and no question was suggested to the court, disputing the right of *The Revolutionnaire* to share in the whole interest, though it is said it was always intended to try the question as to the bounties.

The right of *The Revolutionnaire* to share in the capture of the hulls is conceded; but it is said that the order in council of the 30th of September, 1825, has raised a distinction as to the bounty given by the act, and appropriates that exclusively to the persons who were actually present at the attack, and composed the boats' crews detached on that service. With this single exception, the general

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<sup>1</sup> For the crews of the barges, the distance was alleged to have been fifteen miles, and that, "as well from the distance, as from their having rounded a point of land, the barges and the piratical boats were wholly out of sight of the ship." On the other side it was alleged, "that the distance was only eight, or, at most ten miles."



## Two Piratical Gun-Boats. 2 Hagg.

principle of the navy is strongly recognized of holding a strict unity and identity between the several classes of seamen composing a ship's company; and no instance has been shown, in modern practice, in which any severance has been made between them, even in head-money or bounty, with reference to any special facts [ \*409 ] of particular \*captures. The advantages of such a principle may be inferred from its long adoption, if they were not obvious, in many views, to common observation. The public force is best economized by such an arrangement; and detachments are made adequate to the object to be attained; it preserves general subordination and general harmony between the crew; whereas a contrary system, encouraging individuals to catch at separate interests, according to shades and degrees of service, would not fail to raise distinctions of jealousy and preference, and to introduce constant litigation between individuals. On the present system, it may be further observed, may be ingrafted, and is ingrafted, the opportunity of superadding personal and individual advancement, on account of special services; and the gallantry of the present action has been so attended with promotion to the chief officer, and perhaps by other subordinate appointments.

The general principle of distribution of bounty or head-money in the prize acts <sup>1</sup> has been to give it to the officers and seamen actually on board a king's ship or privateer at the actual taking. The Pirate

Act <sup>2</sup> also declares the bounty to be meant as an encouragement [ \*410 ] ment \*to the commanders, officers, and crews of his Majesty's ships, and gives the bounty to the officers and seamen actually on board at the actual taking and destroying, and it further provides that such bounty shall be distributed to and amongst such persons, and in such manner, form, and proportion as his Majesty, by any order in council, shall direct.

The persons, therefore, to whom the bounty is given are specified

<sup>1</sup> See 45 Geo. III. c. 72, ss. 5, 6; 55 Geo. III. c. 160, s. 6.

<sup>2</sup> The 6 Geo. IV. c. 49, (passed on 22d of June, 1825,) entitled, "An Act for encouraging the Capture or Destruction of Piratical Ships and Vessels," recites, "Whereas, it is expedient to give encouragement to the commanders, officers, and crews of his Majesty's ships of war and hired armed ships to attack and destroy any ships, vessels, or boats manned by pirates," be it enacted, that there be paid "unto the officers, seamen, marines, soldiers, and others, who shall have been actually on board any of his Majesty's ships or vessels of war, or hired armed ships, at the actual taking, sinking, burning, or otherwise destroying of any ship, vessel, or boat manned by pirates, since 1st of January, 1820, 20*l.* for every pirate taken and secured or killed during the attack, and 5*l.* for every man of the crew not taken or killed, who shall have been alive on board the pirate ship at the beginning of the attack."

by this statute, and are the same as those partaking in the distribution of head-money; and it may be doubted whether the order in council could, if it so intended, entirely strip any classes of persons, so specially described in the act of parliament, of all interest in the grant. The only authority to the contrary is alleged to be contained in the concluding sentence of the order, which directs the proceeds of a pirate ship, and the bounty, to be distributed according to a former order of the 23d of June, 1824, "save and except that no flag-officer or other person, not actually present at the capture or destruction of the pirate vessel, shall be entitled to share in the distribution of bounty, in respect of the crews of such pirate ships, vessels, or boats;" and adds that, "in all cases where any flag-officer or flag-officers shall be so actually present, the captain shall take only two eighths, and the flag-officer or flag-officers one eighth." There is, in this order, an entire omission of any supposition of captures by boats, in creeks or shoals, or at any distance from the ship, as frequently happens, in consequence of local difficulties, and no provision is made for distribution of the three eighths to any person but the captain and flag-officer. In all former practice, those actually on board the king's ship at the taking were considered as present. The exceptive clause says, perhaps, no more than that no flag-officer or other person not actually present, that is, not on board the ship, shall share; whilst those who were considered as actually present before may be still so considered according to the rules of the service, and so come within the meaning of these terms. I feel a difficulty, also, in saying that the exclusive terms "No flag-officer or other person" adequately describe the captain and other component parts of the ship's company. To exclude them, who had always been admitted before, seems to require that more distinct and appropriate terms should have been used. Looking to these considerations, I am inclined to adhere to the interpretation which agrees with all general analogy and former practice; and I feel fortified in such construction by seeing, as I have before observed, that the words of the act of parliament give this bounty to the officers, and seamen, and others, who shall have been actually on board his Majesty's ships at the taking or destroying of any pirate boat; and I think I ought to presume that the order in council, in regulating the distribution, meant to preserve those interests.

Interest of the whole ship's crew established.

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Three Slaves. 2 Hagg.

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[ \* 412 ]

\* THREE SLAVES.

July 6, 1832.

Slaves, recently but not legally transferred from a son to his mother, removed from Watling's Island to New Providence, both places being under the same government, a license from the governor for their removal as plantation slaves under 5 Geo. IV. c. 113, s. 14, having been refused, and without certificate of registration, and afterwards claimed by the mother as domestic slaves attending upon the son as part of her family, condemned.

THIS was an appeal from the Vice-Admiralty Court of the Bahamas, upon an information under the 5 Geo. IV. c. 113, the Slave Abolition Act, for an illegal removal of two female slaves, and a male infant, from Watling's Island to New Providence, without license from the governor, and without a certificate of registration. The seizure took place in June, 1831; and the question turned upon the fourteenth, seventeenth, and forty-second sections of the statute. The court having decreed restitution of the slaves, but that "there was probable cause of seizure," this appeal was prosecuted by the crown.

The *King's Advocate*, in support of the appeal.

*Phillimore, contra.*

## JUDGMENT.

SIR C. ROBINSON. This is a perplexing case for a court of appeal, as it grows out of an obscure transaction between a busy, blundering woman, as her solicitor describes her, and her son, who was also described in the court below as a person, though not quite an idiot, laboring under great imbecility of mind; and I presume these considerations have been felt, in some degree, on the part of the prosecution, as the proceedings are not for penalties, but only for the condemnation of the slaves, who have been liberated according to the provisions of the act, on an appeal. The effect of this appeal, therefore, is only to determine whether the party is entitled to [ \* 413 ] compensation, or on whom \* the loss so occasioned must fall.

The proceedings in the court below failed to support the special grounds of the information, in the opinion of the learned and experienced judge who tried the cause; and it is only by a close and critical examination of the acts and designs of the parties, as established in evidence on the several counts of the information, that I can find any ground for coming to a different conclusion. Judging

from the information alone, and the sentence, I might almost doubt whether the legality of the transaction, independent of the intention to sell, which is negatived, and the intrinsic character of the slaves, was intended to be put in issue. But, taking the last count of the information, together with the principles asserted in the claim, I believe the case may be considered as raised in all the views that I think properly belong to it.

It appears that a gift or transfer of two slaves, from the son to his mother, was projected in the month of May, and a form of instrument prepared, which, however, was not executed; and as slaves, it is said, can only pass by writing, it does not appear, as the judge below observes, that this woman can strictly be considered as entitled to claim. However that may be, in concurrence with the projected transfer, the mother and son presented a petition to the governor, praying to be allowed to remove these slaves from Watling's Island to Nassau, under the power given by the fourteenth section of the statute relating to plantation slaves, intended to be moved from one plantation to another, under the same government, and belonging to the same person. These persons having no plantation at New Providence, but meaning to remove \*the slaves for [ \*414 ] domestic uses only, the petition was found not to be within the powers given by the act, and was accordingly refused. In the meantime, the mother and son had sent a sloop to fetch the slaves, and they were shipped at Watling's Island and brought to Hog Island, and there deposited with the slaves of a Mr. Hall, for the purpose of being moved on, as circumstances might render practicable. The master says he went back for them the next day, meaning to remove them to another island, and found them gone. It appears they had been brought to the mouth of the port of Nassau, and were seized on board the sloop, without any document relating to them, or any explanation given respecting them. Unquestionably, this mode of shipping and unshipping slaves, without authority from the officers of the customs or from the government, must come under the general prohibition of the act; and in that broad light such transactions ought first to be considered; and unless any of the special exceptions afterwards allowed by the act can be applied to them, the illegality must remain; and it is not by collateral moral reasonings on the objects or motives of the proprietors, or of the hardships in which the policy of the slave laws may have placed them, that their legal justification can be worked out. If, in this mode of considering the law, the penalty attaches, it is not in the power of the court to relieve the parties, without doing more mischief, in the general interpretation of the act, than can be warranted by any feelings of compassion for the parties.

The claimant asserts, "that the slaves having been taken [ \* 415 ] on board at Watling's Island, *bonâ fide*, \* as domestic servants, in attendance on a part of the family of the claimant, their owner, from one island to another, no license, permit, certificate of registration, clearance, indorsement of clearance, or other like document, was necessary, or required by law, in order to legalize the transmission ; and she is advised none of the matters or things confessed in her answer comes within the meaning of the statutes, so as to make the slaves liable to forfeiture or condemnation."

This is the broad question ; and if this is so, it is a complete license for slaveholders in Watling's Island to ship them, and carry them seven days' sail, or more, without molestation, with all the danger of abuse that must attend a liberty so assumed. The prohibition in the act of parliament is, on the contrary, I conceive, absolute and universal, saving the exception specified in the act ; and the only exception attempted to be applied to this case is that allowed in the seventeenth section, relating to domestic slaves attending their masters or mistresses in their voyage or journey ; and by the fair construction of this clause the legality of the transaction must be tried. The principle of this exception was much discussed in *The Adelaide*.<sup>1</sup> Other cases have since occurred in the court at Trinidad,<sup>2</sup> where a similar attempt to cover the purchase and permanent removal of slaves, under the pretext of domestic attendance, has been repelled, and the principle of the act vindicated, as not capable of being bent and nullified by such false and fraudulent pretences. The same notion of constructing

claims, in evasion of the act, on such pretences, seems to be [ \* 416 ] common in this island ; \* and is, I presume, adverted to in an opinion given to the claimant by her solicitor, where it is said "that as she had no lands at New Providence, and did not come under the fourteenth section of the act, it was only as domestic slaves she could legally remove them." In the same gentleman's opinion to the governor, exhibited also in the process, it is said, that "the removal of slaves from one island to another, within the same government, for the purpose of being used as domestics, and not *in transitu* actually attending as such on their owners or masters, is not authorized by the statute." This is undoubtedly correct ; and must be understood to qualify the notion of a legal removal in manner before referred to. The truth is, that the law has not followed up the case of slaves allowed to attend their owners, so as to require them to be returned at any definite time, or to be otherwise sufficiently accounted

<sup>1</sup> *Supra*, p. 130.

<sup>2</sup> *The Eliza Pratt*, Oct. 8, 1829.

for; and in this omission I think the act is defective, and parties may take the benefit of the ambiguity, and engraft permanent removal on temporary attendance; and the law may not be able in all cases to detect them. But the exception is not so designed in the act; and I think it is impossible with accuracy to describe the means afforded by that exception as a legal mode of permanent removal of domestic slaves, without an actual and *bonâ fide* attendance on their master.

The question, which I proceed to consider, is in what sense these slaves were shipped as domestic slaves attendant on their master. There are two counts in the information charging intention to sell, which have been negatived, as not proved, though there are traces of a conversation to that effect, and some other suspicious circumstances. \* There is also a count disputing the domestic cha- [ \* 417 ] racter of these persons, and alleging that they were plantation slaves at Watling's Island, and that it is not competent in the owner to convert them to domestic slaves. The court below rejected that count, and, I think, not improperly, because I am not prepared to say that the clause requiring them to be really domestic slaves, might not be satisfied with their being really used and employed, *bonâ fide*, in that character; as, I suppose, particular individuals might be found with proper qualifications for such service, though before classed among plantation slaves. I will say no more on that point, however, than that no strictness which I have yet had occasion to apply to the consideration of the act, induces me to think such a construction would not be consistent with the act. The last count alleges the general illegality of the transaction; and on this count, the removal alone, without other aggravating imputations, is, I think, put in issue. The question arising on it is, in what sense were these persons shipped as attendant on the master, and under what authority? The seventeenth clause provides, that "nothing in the act shall prevent any slave, being really and truly the domestic servant of any person, &c., from attending such master by sea to any place whatever; nevertheless, under the following regulations." Then follow regulations relating to certificates, &c. Now the first thing required is the act and intention of shipping persons in that character; and then the observance of the forms prescribed for doing it, to prevent fraud. In the present case, how can it be said or believed there was any such act or intention at any time entertained or expressed? The \* master gives no account of it. [ \* 418 ] The sloop had been sent down for these slaves before it was thought necessary to have recourse to this expedient; and there had been no communication afterwards. The master describes the slaves as playing about the plantation, and says they were taken on board

the sloop and carried to Hog Island; there they were deposited with the slaves of Hall. The son seems to have given no directions, and made no claim to the special services of these persons when they came to Hog Island. He went away, requiring no slave to attend him. It is true, he had been on board; but it is putting the cart before the horse to say they were attendant on him; on the contrary, he seems to have been attendant on them, for the purpose of superintending the clandestine management of these slaves, till it could be known whether the governor's license had been obtained. It is not till the ninth of June, when these slaves were on their passage, that a letter from the claimant to her son is written, in which the advice is given, which was never received, and therefore could not have been acted upon. It is in that letter suggested, apparently as a new device, "If you are coming down, call into Cat Island, and your uncle can clear them out as your domestics, without troubling the governor." How is this consistent with the supposition that the son had shipped them, or used them in that character in the former part of the voyage, even in the apprehension of the claimant herself? I think this pretence is completely refuted by the act of the parties.

Then as to documents. It is not pretended that any certificate of registration had been obtained; but it is said there was no [ \* 419 ] custom-house, and \* a subsequent act has provided for such cases.<sup>1</sup> But it has required certain substitutes, and they also are wanting; and it is said also there were no means of obtaining these certificates. If that were so, I am not prepared to say that the parties were thereby remitted to their natural liberty, and freed from the obligation of observing the general prohibition of the statute. I think, on the contrary, that the parties are bound to observe the general provisions of the act, if particular circumstances prevent them from availing themselves of all the exceptions that might be applicable to their case. In the present case I think there is no excuse for that plea; for I am persuaded the party never thought of using these slaves as attendants on his person. That was a mere nominal pretence, and not resorted to till after the offence had been committed. I feel myself, therefore, to be under the necessity of rejecting the claim, and of condemning these slaves. As the case is under peculiar circumstances, and there is some reason to impute the contraventions of the act to ignorance rather than to design; and as it was brought here to try the law, I shall not throw the costs on the claimant.

Slaves condemned.

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<sup>1</sup> 9 Geo. IV. c. 82, s. 2. See *infra*, the slave Duncan, p. 435, 436.

\* NEW PHOENIX, Barton.

[ \* 420 ]

November 13, 1832.

Loss arising from the gross negligence of a mariner, may be set off against a claim for wages.

THIS was a claim for wages, amounting to 8*l.* 19*s.* 9*d.*, at the suit of Joseph Witted, the second mate of a vessel employed in the West India trade. The summary petition, after the usual averments, referred to the ground on which payment had been refused, and described the ground of refusal as occasioned by an accident abroad, arising from the breaking of a rope, while in the act of lowering down a hogshead of sugar, in Jacks Bay, Annatto Bay, from the wharf, owing to which it fell overboard, and was damaged; it was further asserted, that the accident happened in the presence and under the superintendence of the wharfinger. For the owners an allegation was offered, denying that the wharfinger was present, and pleading that it was the custom of the trade that the wharfinger should be answerable for losses happening to the sugars in shipping under his care. The allegation charged the loss as arising from the gross negligence of the mate, in proceeding to take the sugar on board in the absence of the wharfinger, and without due attention to the working of the crane,<sup>1</sup> by which the damage \* was said to have occurred. [ \* 421 ] red. It further pleaded, that from the loss so accruing to the owners of the cargo, a deduction of freight had ensued, which the shipowners were entitled to set off against the wages. The allegation also contained a charge of misconduct, in lading the sugars at an improper time in the evening, although the boat could not safely have ventured to get out of the bay till the next morning. This latter averment was opposed as irrelevant, and the court eventually directed it to be expunged.

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<sup>1</sup> The plea was to this effect: "That Witted and others, by his desire, lifted the hogshead by heaving on the crane; that Witted having cried 'High enough,' and shoved the hogshead clear of the wharf, called out 'Lower,' when a man took hold of a rope, used as a stopper for the said crane in lowering goods, and let go the wheel, when the stopper rope, not having been made fast at the other end, gave way, and the wheel running round with great velocity, precipitated the hogshead upon the deck of the boat, and thence into the sea."



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Boddington's. 2 Hagg.

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The *King's Advocate*, for the mate, did not deny that compensation might be claimed for loss occasioned by gross misconduct or negligence; but he argued, that the loss, in this case, was owing to a mere accident, which happened in the presence of the wharfinger.

*Addams*, for the owners, denied the truth of the mate's statement, and contended that he was liable for the loss to the amount of his wages, on the known principles of the maritime law, recognized in all books of authority. Abbott on Shipping, 5th ed. p. 472.

COURT. The principle is undoubted, and too important to be lightly treated. It has been generally recognized in all [ \*422 ] books on maritime law,<sup>1</sup> and particularly in the *King's Bench*, in the cases cited in Lord Tenterden's *Treatise on Shipping*; and it is the duty of this court to uphold it, if sufficient grounds are laid. The court, therefore, thinks that those parts of the allegation which plead the custom of the trade as to the responsibility of the wharfinger, with respect to goods shipped under his care, the shipping, in this instance, in his absence, and without proper attention, and the anxiety expressed by the mate to conceal what had been done, and his subsequent declarations to one of the crew, may be strictly pertinent; and if the case is proved to that effect, it may support the defence of the owners, and may entitle them to withhold the wages in compensation for a loss so occasioned.

The allegation was directed to be reformed.

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### BODDINGTON'S, Noyes.

November 20, 1832.

The report of the registrar and merchants — disallowing, as irregular and unusual, where there is a bottomry premium, a charge of insurance on money advanced to the master on bottomry, and forming part of the amount of the bond, — confirmed; bottomry bonds, given by the master, binding the owners only for sums necessary for repairs, and for the furtherance of the voyage, and maritime interest being only allowed as a compensation for maritime risk.

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<sup>1</sup> See *Laws of Oleron*, art. 10; *Consolato du Mare*, c. 247. Also *Articles of Wisbuy*; and *Les Us et Coutumes de la Mer*, p. 150, in which loss by the negligent use of the ship's ropes is incidentally noticed.

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Boddington's. 2 Hagg.

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Lenders on bottomry, if not restrained by special regulations, may insure their advances in a distinct contract on their own account.

THIS question arose upon a bottomry bond, given at Calcutta, in which an insurance of three per cent., purported to be guaranteed by the bond, had been disallowed by the registrar and merchants. The case came on in objection to the report, upon act on petition and affidavits.

The *King's Advocate*, for the bondholders.

*Dodson, contra.*

JUDGMENT.

SIR C. ROBINSON. This is a question relating to the charge of insurance, on a sum of \* money advanced on [ \* 423 ] bottomry, and forming part of the amount of the bond. The registrar and merchants have disallowed it, and the case now comes on in objection to their report. The ship had met with an accident in the Hoogley river, which obliged the master to put back to Calcutta for repair; and a sum of money was borrowed on bottomry to discharge these expenses. The bond was given for 2,218*l.*, and there is no dispute as to the principal sum; but it appears from the accounts, that a sum of 86*l.* was not applied to the use of the ship, but was expended, or allowed on account with the lender, as a premium of insurance at three per cent. on the amount of the bond. No policies are produced, and it does not appear distinctly whether the master or the bondholders actually insured, or whether the bondholders were to stand their own insurance on that allowance.

The master, in his affidavit, states "that it was agreed between him and the bondholders, that if the premium should be no more than twelve per cent. per annum, he (deponent) would pay the expense attending the insurance of the ship to the amount of the bond; that the sum for insurance, in consequence of his being without funds, was also embodied in the bottomry bond, as appears in the account." I do not exactly understand what the master means by "embodied in the bond," since the instrument itself describes the whole money to have been expended in necessary and indispensable repairs, and supplies, which is a very accurate definition of the proper application of money so borrowed; and, as to its appearing "in the accounts," they cannot properly be identified with the bond though they relate to it. On the \* transaction so explained, the sum charged for [ \* 424 ] insurance has been disallowed as "irregular and unusual,

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when there is a bottomry premium." And the report adds further, "that it is disallowed expressly on account of irregularity, as a fixed premium of twelve per cent. for the voyage would have been deemed a reasonable rate, and have come to more than the sum now charged."

The report is objected to on the part of the bondholders, and the court is asked to allow this sum of three per cent., in addition to the premium stipulated in the bond; and it is said, that the court may do this, although the registrar and merchants might be bound by the rules observed in ordinary practice. Upon inquiry, I do not find that many instances have occurred in which such an item has appeared. In *The Rhadamanthe*, 1 Dod. 201, in 1813, the insurance was disallowed, and the parties acquiesced; and I do not find that there has been any case in which such a charge has been brought to the notice of the court. The inference to be drawn from this paucity of precedents, however, is by no means favorable to the claim, because it shows that there is no solid ground for the exception, and that this species of contract can go on very well without it. On the other hand, great inconvenience must inevitably ensue both in this court, and in other courts which are guided by its rules, if the established practice is disturbed.

It is said that M'Intosh & Co. have a just claim on the court to make this addition, that they may not suffer by an insufficient premium, and that no essential principle of bottomry would be violated by such an allowance. On this point I am by no means

[ \* 425 ] satisfied. It is to be recollected, \* that this is a bottomry

bond executed by the master of the ship—who has no power to bind the ship or the owner by the law of England, except within special limits—for repairs and supplies becoming necessary from the exigencies of the voyage. This is an essential principle of this species of bottomry, and the court has hitherto acted with great strictness in not extending the privilege of bottomry against the ship beyond these limits, confining it to sums necessary for repairs, and for the furtherance of the voyage.

Another essential principle of all bottomry is, that maritime interest is allowed only as a compensation for maritime risk, which usually attends advances of this kind. The advance of the sum in question was not necessary for the furtherance of the voyage, nor was it made under that representation; and it is in no manner subject to maritime risk. I do not see, therefore, with what propriety it can be introduced into a bond that is to bear maritime interest. Since the introduction of insurance, lenders on bottomry, if not restrained by special regulations, may insure their own advances in a distinct contract on their own account; but it would be contrary to the essential character of

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bottomry to make it a part and condition of the bond ; and after hypothecating the ship in maritime interest for maritime risk, to hypothecate it also, in the same bond with the same interest, to take off that risk by other collateral engagements. This is contradictory in form, at least, and I think in principle.

I am not prepared to enter into the consideration of all the consequences that might attend such a change of practice as is now applied for ; because \*nothing has been said upon [ \*426 ] them, and because it is an intricate subject, and may more safely be left to mercantile men. In the present case the premium is low, and the rate of insurance also ; and if there has been any mistake, the court might wish to relieve against it : but, in time of war, both the premium and the insurance would be high, perhaps thirty or forty per cent., or even more, and the consequences might be very different. The settlement of such accounts would, at least, be complicated ; and much ambiguity and uncertainty would be introduced by any change of practice on this point in a contract, which ought to be kept as simple and uniform as possible.

If this article of expenditure is not properly a subject of bottomry, it cannot be made so, as I have before observed, by the mere agreement of the master ; and I repeat the observation, because I think I perceive traces of a different notion prevailing on this point in India, both in this agreement, and also in the bond, in the case of *The Reliance* now depending, in which the master actually stipulates in the bond, that he has the power which he has exercised. This is an additional reason why the court should be very guarded in adhering to the rules and principles which have hitherto been observed on this species of bond. If a bond should appear with such an exception given by an owner himself in a foreign country, as might happen, the case might be different, or the question perhaps would not be raised : but, with reference to the present bond and the facts of this case, I think it my duty to adhere to the limits which have hitherto been assigned to the master's power in bonds of this description ; and I therefore, confirm the report.

[ \* 427 ]

\* THE SLAVE DUNCAN.

December 6, 1832.

On appeal from the restitution of a slave, the alleged property of A, to whom he had only been just transferred, and shipped for removal from Nassau to Ragged Island, within the same government, on board a vessel cleared for Cuba, but (the governor's license, which had been applied for, not having been received) relanded, and subsequently seized, the court affirmed the sentence, but without costs, holding that the transfer, though suspicious, was apparently valid and legal; that the shipment was *bonâ fide* for Ragged Island, and contingent on the obtaining a license, and that the bare shipment did not work a forfeiture, the intention of removal without a license being negatived by the relanding.

THIS was an appeal from the Bahama islands; and the cause was originally instituted upon an information filed at the instance of the searcher and waiter of the customs for the port of Nassau, alleging, in substance, that the above slave had been shipped in that harbor for removal, in violation of 5 Geo. IV. c. 113, ss. 14, 17. A claim was interposed by Mr. Lightbourn, a merchant of New Providence, on behalf of Mr. Taylor, of Ragged Island; and the slave was restored. From this sentence an appeal was prosecuted on the part of the crown.

*Phillimore*, in support of the sentence.

*The King's Advocate*, *contra*.

#### JUDGMENT.

SIR C. ROBINSON. This is an appeal from the Vice-Admiralty Court of New Providence against a sentence of restitution of a slave, in a prosecution under the Slave Abolition Act. It appears that a ship, *The Wellington*, cleared out from Nassau for Cuba on the 14th of June, 1831, and sailed on the 16th. After the vessel had sailed, the searcher of the customs discovered that the slave Duncan had been put on board on the 15th, and had been relanded on the 16th; and on that ground a seizure was made of the slave at the public work-house, which seems to be a place of deposit for slaves, and where this slave had been placed by Mr. Lightbourn. The information or \*libel, contains six counts, varying the charge in every possible way, and, I think, very much to the disadvantage of the prosecution; for there appears to be only two real points in this case — first, whether the asserted ownership of Taylor was liable to be disputed; and, secondly, whether the circumstances under

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which the shipment was made on the 15th were a violation of the Slave Abolition Act, and came within the penal provisions of that act.

The facts, on which the claimant relies are as follow :— he states “ that he, Lightbourn, was the agent of Taylor, and that the slave belonged to him, and had been his property for some time, but before the slave was put on board the ship, in June, he had agreed to sell him to Taylor for a valuable consideration, but for a long credit, and in pursuance of that agreement Taylor had required Lightbourn to send the slave to Ragged Island ; that Lightbourn, having on the 14th of June, executed a bill of sale, addressed an application to the governor for a license to ship the slave to Ragged Island, to Taylor, who possessed an estate there, and plantation and a manufactory of salt ;<sup>1</sup> that on the 16th (though the license is dated the 17th) he received a license from the governor ; that the slave was carried on board on the 15th, Lightbourn expecting to receive the license, and having no reason to apprehend that it would be withheld ; and the slave was put on board a vessel ready to sail immediately to [ \* 429 ] Ragged Island, and from thence to Cuba ; that the sole intention of Lightbourn, in carrying this slave boy on board the vessel, was to convey him to that island, if he could obtain a license and not otherwise ; and that there was no purpose or intention on his part, or on the part of any other person, that the slave should be taken further, or landed in any other place than Ragged Island, or otherwise dealt with or disposed of ; and, therefore, he denies that the slave was shipped, as alleged, with the intention to carry him to Cuba ; that the master becoming impatient to proceed on his voyage, and the license not being obtained, the slave was relanded from the vessel and taken to the public workhouse, and it was only some time after the slave was lodged there, and the ship had sailed, that the seizure was made.”

With reference to this history, which is verified by the affidavit of Mr. Lightbourn, the first count of the information pleads simply the shipment on board the vessel, cleared for and bound to Cuba, in order to his being treated and dealt with as a slave. I do not perceive any clause in the act which relates to shipment, without “ the purpose of carrying away and removing,” or that there is prohibition of shipment without that purpose. The third section, which imposes the forfeiture of the slave, certainly requires that averment. The effect of the obser-

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<sup>1</sup> The certificate of registration stated, that on 1st of January 1831, the slave Duncan was registered as the property of W. Lightbourn, now the property of A. Taylor, of Ragged Island.

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vation is slight; it only shows that the count is not very necessary, and not in the terms of the act of parliament. The second and third counts amply supply the averment; and, therefore, the real question on this first part of the case, respecting the suggested [ \* 430 ] destination to Cuba, \*is, whether there is a proof of shipment for the purpose of removing and carrying away this slave to Cuba. There is no positive proof offered; neither the master of the vessel, nor any of the sailors have been produced to prove any thing done or said relative to a removal to Cuba. There have been no proceedings against the ship, or owner, or master, as there might have been if they were privy to such a purpose. The evidence rests on the clearance and sailing for Cuba on the 16th, and on the entry inwards of the vessel again from Cuba on the 27th, implying that she had gone to that island; and there is the circumstance, that no mention was made to the custom-house officers of any intention of touching at Ragged Island to take in a cargo of salt, as suggested, or for any other purpose. This is the effect of the proof, resting entirely on inference, on that part of the case. There is no proof whether the vessel did go to Ragged Island or not; and if she did not, it furnishes a very slight inference, if any, that she might not have gone there, if this slave had proceeded in her; for Ragged Island lies in the old Bahama Channel, in the course to Cuba, and I presume the slave might have been delivered at Ragged Island without any material deviation from the course to Cuba; whether she should touch at Ragged Island or not, might depend upon the fact whether or not the slave was on board.

This is the whole of the evidence as to Cuba; and it is enough to discredit it, to say that it is not the best evidence that might have been produced; because the master, or the mariners, might have spoken to the fact; or there might have been some positive [ \* 431 ] evidence of an intention to send the slave \* to Cuba, as affecting the person who put him on board; without which the court cannot trust to the effect of the mere inference drawn from the clearance of the vessel, and from the fact of her going to, and returning from, Cuba. On the other side are all the inferences to be drawn from the *res gestæ* of the case, as detailed in the documents in the claim; first, the oath of a very respectable person, Mr. Lightbourn; secondly, the grave applications which were made to the governor, and through him to the attorney-general, exciting the attention of the public authorities to the fact that this slave was intended to be shipped and sent away; and all this machinery is supposed to be employed to mask the purpose of sending this boy to Cuba. It is, I think, a very improbable and incredible suggestion, that it was intended to send him to Cuba; when it appears there was employment for him at home

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well suited to his qualifications. The weight of the evidence from inference, therefore preponderates very strongly against the probability of his destination to Cuba. The judge in the court below appears to have dismissed this count of the libel with very few observations; and I think the more it is examined, the more improbable it appears; and is my duty to dismiss it likewise.

The counts relating to a destination to Ragged Island, bring under consideration the state of the property; and here, again, one count very unnecessarily lays the property merely negatively, as not being the property of Taylor, whereas it is clear that the slave belonged to Taylor or Lightbourn; the other counts describe the slave as the property of Lightbourn or of Taylor; and I \* think [ \* 432 ] this was, at the outset, a most important part of the case; because if there has been any contravention of the act, as to this requisite of ownership, it is one of falsehood, fraud, and clear illegality, and could not have been investigated too minutely on the island, where it could be done more effectually than I can do it now. There was certainly enough to justify a very grave suspicion on that point. But what is the proof in the case, as it stands before me? There is the fact that the slave recently belonged to Lightbourn; that the asserted transfer was only completed on the 14th, and that the entry in the workhouse-book described the slave as the property of Lightbourn on the 15th and 16th. On the other side, there is the oath of Mr. Lightbourn, who swears that the slave had been transferred to Taylor, and a more official entry than that in the workhouse-book—the entry in the registry, which describes the slave as having been transferred to and as belonging to Taylor on the 14th. There is no concealment in any part of the case; the registry is, I presume, an office of public access, and all would know what was done in regard to such a matter as this.

As to the contradictory description of the slave in the book of the registry and in that of the workhouse, where he was described as the property of Lightbourn, I do not know by whom that was done. It appears that the slave was a considerable part of the year in the workhouse as a runaway, and, therefore, might be known as Lightbourn's slave; but there is no proof from whom that description came. There is, also, in opposition to this inference, what I think very important, a \* reference to the asserted ownership of Taylor, in the [ \* 433 ] opinion of the attorney-general given on the 16th, and treating it as a credible fact with respect to the legality of the contemplated removal of the slave, so purchased, from Nassau to Ragged Island, on the supposition of its being a *bonâ fide* and valid purchase. This is not insignificant in a case of this description; and there is



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also the testimony of the secretary of the governor, Mr. Nesbitt, "that Lightbourn had always borne a character for uprightness, integrity, and general respectability." Such testimony must insure the respect of this court to the averment of a person of such character, on his oath.

On this evidence, it is impossible that this court should not hesitate to judge harshly on the question of property, which it has no means of investigating further. Being without information even as to the common forms of transferring slaves in the island; and seeing that the question was so little agitated in the court below, that the learned judge does not notice it, in the imperfect account which the public papers of the island give of his judgment, I think it is my duty to adhere to the view he seems to have taken of the case, and to consider the property, as the attorney-general considered it, in his opinion, as legally transferred to Taylor.<sup>1</sup> There is enough to justify [ \*434 ] suspicion; \*but as I have no evidence of the customs of the islands respecting the transfer of slaves, I think I ought not to agitate this question further, but to defer to the opinion respecting the property as entertained by the attorney-general, and confirmed by the decision of the judge in the court below.

Then, as to the shipment so explained, with reference to the acts done by Mr. Lightbourn. The third section of the act specifies the purpose of removal as the essential character of the offence. The shipment alone might, perhaps, have sustained a presumption as to the intention of removing; and if that had stood doubtful at the time of seizure, it might perhaps not have been competent to parties to aver against that presumption, or to explain it away by collateral acts. But when the purpose is established to the contrary, by the

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<sup>1</sup> In the process transmitted from the Bahamas was a letter, dated 16th of June, 1831, addressed to the governor by the attorney-general of the islands, on the subject of the removal of the slave Duncan. The letter, after reciting 5 Geo. IV. c. 113, s. 13, thus proceeded:—"In this section the word 'island' means, I apprehend, the entire colony; and, therefore, a slave sold in one island of the Bahamas may be lawfully employed or worked in any other of them, the whole of the Bahamas being only one island for the purpose of the sale and purchase of slaves in the section alluded to. I am also of opinion that if the owner of a plantation, situate in any island within the Bahamas, happens to be at any other island where slaves are exposed for sale, he may lawfully purchase them *bonâ fide* for the purpose of removing and employing them on his plantation, upon which he resides, and that, under section 14, a license may properly be granted for that purpose. Mr. Taylor, the petitioner, states himself to be a salt-raker. The raking and manufactory of salt is a laborious but lawful employment for slaves; and as section 13 does not define in what work slaves shall be engaged when so bought or sold, I think the act will allow of the slave's removal to his new purchaser's plantation, although he may be occasionally employed in the manufactory of salt."

relanding of the slave and the departure of the vessel, the case assumes a very different aspect; and the court must hesitate to stand on mere irregularity in what has been done, in opposition to the real substantial character of the transaction. There seems to have been a confident anticipation \* of a license being obtained to export the slave to Ragged Island; and he was put on board on the night of the 15th, instead of waiting till the 16th, when the license was signed and issued. There was confusion and irregularity, undoubtedly, in this; but there is no doubt remaining on my mind that the shipment was made for Ragged Island, and contingently on the expectation of obtaining a license, which had been applied for on the 14th, before the shipment; and I think, under that explanation, and with reference to all the circumstances of the case, it does not sustain the purpose required by the act of a shipment for the purpose of removal, in violation of the act.

With regard to the certificates which are required by the fourteenth section of 5 Geo. IV. c. 113, they are to be obtained before the slave is removed or embarked "for that purpose." That is the form and order prescribed for things remaining to be done under the license. But they had become in this case impossible, by a course of events that impute no fraud or negligence to the party. We are reasoning, not on the effect of the license as used, but as to the effect of the application for it, as qualifying the purpose of shipment. These omissions do not discredit the purpose or intention, and I think they do not otherwise affect the transaction.

It is not improper that I should notice, perhaps, what appears in the judge's sentence, that the situation of these islands is so peculiar that even legal persons did not, before the late arrival of the statute 9 Geo. IV., apprehend clearly that the removal of slaves from one island to another was subject to the restriction of the general act.<sup>1</sup> \* This misapprehension is spoken of as prevail- [\* 436 ]

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<sup>1</sup> The following extracts from the report of the judgment of the learned judge of the Bahamas, are copied from the *Bahama Argus* of September 10, 1831:—"When this statute, 5 Geo. IV. c. 113, was first passed, the fourteenth clause was not considered here as extending to the Bahamas, which are all under one governor and one legislative body, but to such islands as Nevis, Anguilla, and the Virgin Islands, where separate legislative bodies exist, and different laws prevail, although they are under the general government of the captain-general and governor-in-chief of the island of St. Christopher; and this opinion appeared to be strengthened by the consideration that outward clearances and certificates of registration did not appear necessary in the case of slaves removed from one part to another of the same island, or from one island to another in the same colony. The Bahama government extends over several hundreds of islands, or keys, some of greater and some of lesser magnitude; and almost every

ing at the time of this seizure, with reference to other slaves from Watling's Island, seized at the same time, and since condemned; and in that case the court saw in the proceedings some indication of that ignorance as to the law, though it hardly knew how to deal with it.<sup>1</sup> It would be difficult to say now what weight could be

[ \* 437 ] attributed to such an \* excuse in any case of a clear violation of the act. All seizures under this act should be cautiously made, and all proceedings liberally, and not on that account less efficiently, conducted, on the part of the prosecution. But owners of slaves and their agents ought also to act with great caution in all things connected with this very prohibitory statute. They cannot be too strongly admonished not to reason rashly, as they have sometimes appeared to do, in disregard of the strict observance of the regulations of the act; for it is with great difficulty that courts of justice can make allowance for ignorance, or error, that might have been avoided, or for culpable, though perhaps undesigned, irregularities and omissions. With reference to such facts as compose this case, a state of doubt as to the law, so prevailing at the time of the transaction, is an additional claim to a favorable interpretation of the conduct of individuals, and increases the satisfaction I feel in being able to concur in the sentence of restitution pronounced by the court below.

With respect to the costs, I perceive that the judge gave the costs of the claimant against the prosecutor, and declined to certify for a probable cause of seizure. I do not concur with him on that point. I think the claimant might very justly have been left to bear his own expenses in one instance. I shall so leave it. And as it may, perhaps, be convenient not to disturb the sentence in any respect, I shall not make any order as to the costs of the appeal.

Sentence affirmed.

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parish includes several islands and keys. It was therefore supposed that when the inhabitants of Jamaica, Barbadoes, &c., possessed under the statute the unrestrained power of removing their slaves at pleasure from county to county, and from one part to another of the same island, without license or permit, none could be necessary to enable the inhabitants of these islands to remove their slaves from one part to another of the same parish. The 9 Geo. IV. c. 84, 'An Act to continue an Act for amending and consolidating the Laws relating to the Abolition of the Slave-Trade,' has been subsequently passed. Looking at the provisions contained in section 2 of that act, the governor's license has since been deemed necessary for the removal of slaves from one island to another within the Bahama government, for the purpose of cultivating the plantation belonging to the said proprietor; and he should consider this to be the true construction of the act, until he was otherwise advised by the decision of a Court of Appeal."

<sup>1</sup> See the Three Slaves, *supra*, 419.

\* THE LORD WARDEN AND ADMIRAL OF THE CINQUE PORTS [ \* 438 ]  
v. HIS MAJESTY, in his office of admiralty.

(*In the Matter of a Whale.*)

December 23, 1831.

Royal fish "found and taken within the precincts, limits, liberties, or jurisdiction of the Cinque Ports, or their members," belong to the Lord Warden.

IN 1829, the masters and crews of seven oyster smacks having discovered a whale three miles from the shore, towed it on to Whitstable Beach. The expenses of converting this whale into oil, and storing it, amounted to 370*l.*, the value of the produce.

The smacksmen wished either that the oil should be condemned to them, or that it should be sold, and the accounts defrayed out of the proceeds.

A warrant having issued, under seal of this court, for the arrest of the whale, oil, blubber, and bones, and citing all persons to show cause why the same should not be condemned as perquisites of the Lord Warden, a claim was entered for the smacksmen, and an appearance given on behalf of his Majesty in his office of admiralty.

The Lord Warden alleged, that "all wrecks of the sea, merchandise, and effects, flotsam, &c., &c., or derelict, together with all fees, emoluments, profits, perquisites, and other advantages whatsoever to the offices of Constable of Dover Castle, Lord Warden, Chancellor, and Admiral of the Cinque Ports, two ancient towns, or their members, for eighty, ninety, or one hundred years last past, and during the time whereof the memory of man is not to the contrary, have belonged and still do of right belong to the Lord Wardens and Admirals of the Cinque Ports, and so belong to the present Lord Warden and \* Admiral thereof; and further alleging that [ \* 439 ] the said whale, oil, and blubber, the produce thereof, (being found and taken within the precincts, liberties, limits, or jurisdiction of the Cinque Ports, or their members,) in case the right and property thereto cannot be made to appear by some person claiming the same, will belong to the present Lord Warden and Admiral of the Cinque Ports."

It was alleged, *contra*, that in the patent, (under the great seal of England, dated the 15th of July, 1829, and by which certain commissioners were appointed for executing the office of High Admiral of the U. K. of G. B. and Ireland, and of the dominions, islands,

The Lord Warden of the Cinque Ports v. The King, &c. 2 Hagg.

and territories thereunto belonging—it is recited: “Whereas all wrecks of the sea, goods and ships taken from pirates, and divers droits, rights, duties, and privileges, have been by express words, or otherwise, heretofore granted to our said High Admiral and to former admirals, for their own benefit, as duties appertaining to the office of our High Admiral; our further will and pleasure is, and we do hereby charge and command that all casual duties, droits, and profits be taken, collected, and received in all places where they shall happen by the vice-admirals and other officers of or belonging to the admiralty, in such sort as they formerly were or ought to have been taken, collected, and received by them, and every of them respectively, when there was an High Admiral of G. B.; and the said vice-admirals and others so taking, collecting, or receiving the same, shall account for the same unto or before you, our said commissioners, or as you shall appoint, but to our only use and behoof and not otherwise.”

[ \* 440 ] Further alleging, that “all royal fishes, such as sturgeons, grampuses, whales, porpoises, dolphins, riggs, and generally all other fishes of very large bulk or fatness were expressly granted and conveyed. That wheresoever the whale, now proceeded against, may have been taken, there is no grant made in and by the patent for the office of Lord Warden and Admiral of the Cinque Ports of any royal fishes whatever; that in 1762, five whales having been taken within the jurisdiction, and proceeded against in the Admiralty Court of the Cinque Ports, as droits and perquisites of the Lord Warden and Admiral of the same, were claimed as droits and perquisites of H. M. in his office of admiralty; and, on the 1st of March, 1768, a proxy under the hand and seal of the Duchess Dowager of Dorset, as executrix of Lionel, late Duke of Dorset, the late Lord Warden and Admiral, was exhibited, renouncing her right to the whales, and the same were with such consent, and also with the consent of the Earl of Holderness, the then Lord Warden and Admiral of the Cinque Ports, condemned to H. M., as droits and perquisites of H. M. in his office of admiralty.”

The claim of the fishermen to be remunerated according to the judgment of the court was admitted.

*Addams*, for the Lord Warden.

*The King's Advocate* and *Dodson*, *contra*.

#### JUDGMENT.

DR. PHILLIMORE. These proceedings are instituted for the condemnation of a whale, which, some months back, was discovered off

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The Lord Warden of the Cinque Ports v. The King, &c. 2 Hagg.

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the coast of Kent by several fishermen who were employed in dredging for oysters, and which, by their skill and \*perse- [ \*441 ] verance, was driven on shore in Whitstable Bay.

The transaction clearly occurred within the jurisdiction of the Cinque Ports: and accordingly the officers of the Lord Warden, who is also the Lord Admiral of the Cinque Ports, took the proper steps to lead to the condemnation of the whale in this Court of Admiralty: on the other hand, the fishermen, by whose activity and address the animal had been stranded and secured, gave an appearance in the cause, and claimed salvage for their services. An appearance was also given on behalf of the Lords of the Admiralty, who claimed condemnation of the whale to themselves as a droit and perquisite of the king in his office of admiralty.

The right of the sovereign to royal fish, by which appellation whale and sturgeon are characterized, is a right to which our ancestors attached much importance: and it has descended to our times as clearly established as any of the prerogatives of the crown. We do not go so far as to assert, as some have maintained, that the right is founded on the claim of the king of these realms to the sovereignty of the seas from which the whale has escaped; but, from whatsoever source derived, it is the undoubted law of this realm, (and in this, I apprehend, the claim for salvage originates,) that a whale, found on the shore, or caught near the coasts, of Great Britain, is to be considered not only as being, but as having always been, the property of the crown—property, indeed, so inherent in the crown, that, by a species of legal fiction, it is to be restored to the king as its rightful owner—*veterem ad dominum debere reverti*.\*

\* The law on this point being clear, when this case came [ \*442 ] before the court on a former occasion, the question of salvage was readily disposed of: neither party, who claimed a right to the whale, contested the claim of the salvors to remuneration,—but the question of who had a right to the whale was one of greater difficulty; and I felt the difficulty so much, that I directed the case to stand over, for the purpose of allowing evidence to be introduced that might tend to elucidate or explain it.

Although the whale may vest in the crown in virtue of its prerogative, yet the sovereign may have transferred, and undoubtedly, from the documents before me, it appears that the sovereign, in this instance, has transferred this ancient perquisite to another person; but the question is, to what person? On the one hand, the commissioners for executing the office of the Lord High Admiral claim it as

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*The Lord Warden of the Cinque Ports v. The King, &c. 2 Hagg.*

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a right transferred to the high functionary they represent: on the other, the Admiral of the Cinque Ports, who has a right at least to all the perquisites of the admiralty within his jurisdiction, claims it in virtue of his office. In the patents exhibited of the Lords Commissioners of the Admiralty, no mention is made of royal fish. The grant is of all "duties, rights, and privileges" to which the Lord High Admirals or other admirals were entitled; but on reference to the patents of the Earl of Pembroke, who was Lord High Admiral in the time of William III., and of Prince George of Denmark, who held the same office in Queen Anne's reign, they contain the following words:—"Royal fish, namely, sturgeons, grampuses, whales, porpoises, dolphins, riggs, and graspes, and generally whatsoever other fish having in themselves great and immense size or fat."

[ \* 443 ] \* So with respect to the Lord Warden. The Duke of Wellington's patent grants him "all the commodities, emoluments, profits, and perquisites, in as ample a manner as they have been granted to any of his predecessors." And this is the general tenor of all the patents I have had an opportunity of inspecting; the first of which, in point of date, is that granted by Charles I. to the Earl of Suffolk, on the resignation of Villiers, Duke of Buckingham, in 1628: he was to have the "commodities, emoluments, profits, and privileges thereunto belonging, in as large and ample a manner as Henry, Earl of Northampton; Edward, Lord Zouch; or the Duke of Buckingham, or any other before them, held and enjoyed the same."

What, then, were the privileges and emoluments originally conferred in detail on the Admiral of the Cinque Ports? In the absence of positive evidence, surely there is every presumption that they were, at least, as ample as those conferred on the Lord High Admiral: if so, the question must entirely hinge on the priority of the patent; for it is clear, that if the immunities had been already granted to one admiral, they could not be parcelled out to the other; that is, if they were first granted to the Admiral of the Cinque Ports, the Lord High Admiral's patent must be held not to include these perquisites when accruing within the limits of the Cinque Ports.

We know that at an early period of our history there were several admirals of England, and that each exercised jurisdiction within his respective boundaries. We know, also, that the Admiral of the Cinque Ports was amongst the most ancient of these admirals. There can be no doubt, I think, but that patents were granted to Admirals of the Cinque Ports (which purported to convey to them the right to whales and other royal fish) at an earlier date than that of either of the patents to the Lord High Admiral which have been produced in this cause. We have the remarkable testimony of Sir Leoline Jenkins to this fact; who, in a

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*The Lord Warden of the Cinque Ports v. The King, &c.* 2 Hagg.

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charge given at a session of the admiralty holden within the Cinque Ports in 1668, after stating that, four centuries back, there were always two or three Admirals in England, and that the Admiral of the Cinque Ports was still one, if not the chiefest, of them, adds:—"And those great fleets, which these parts did then furnish on all occasions, called and reputed, by way of preëminence, the king's navies royal, were still commanded by the Lord Warden or their Admiral, and he had all the authorities, rights, and royalties belonging to an admiral annexed to his office, as appears by the commissions of Beauchamp and Herle, who were wardens and admirals of these ports in Edward III.'s time."<sup>1</sup> In another part of the same charge, he distinctly refers to the grant of the prerogative in question:—"All fines and amerciements imposed by this court are the admiral's. All royal fishes, such as whales and sturgeons, are his."<sup>2</sup>

In the state in which the court is left with respect to evidence in this case, I am disposed to place considerable reliance on this authority. Sir Leoline Jenkins was a person of acknowledged diligence and industry; and the facts which he stated to the jury on this solemn occasion were \*probably the result of laborious [ \*445 ] research, and not unlikely to have been derived from a perusal of those ancient records to which he so explicitly refers. If the facts are correctly stated, they are decisive of the question at issue: and if we look to probabilities, they strongly aid the presumption I deduce from his statement. Is it not as probable that the High Admiral should be excluded from the right to royal fishes within the Cinque Ports, as he confessedly is excluded from the right to wreck, to flotsam and jetsam, within the same limits? The situation, too, of the Cinque Ports,—their exposure to invasion, and the prominent station their admiral necessarily occupied in the defence of the kingdom against foreign aggression, in my judgment, leads to the conclusion that the office of Admiral of the Cinque Ports is more ancient than the office of Lord High Admiral.

The records of this court have been searched, and two cases of proceedings against whales have been cited from them. On the 25th of November, 1766, the Lord Warden's proctor instituted proceedings against a "certain whale, spermaceti oil, and blubber thereof, lying at Folkstone." On the 30th of December, 1766, all persons pretending to have an interest in the whale were cited to appear, and a commission of appraisement and sale was decreed, at the motion of the Lord Warden's proctor. On the 14th of January, 1767, the commis-

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<sup>1</sup> Sir L. Jenkins' *Life*, vol. i. p. 85.

<sup>2</sup> *Ibid.* p. 89.



sion of appraisement and sale was returned; but after this period no mention occurs of the cause in the court book.

The information contained in the court book respecting the other case is as inconclusive as that in the case just cited. The [\* 446] case is headed The Lord Warden and Admiral against Five

Whales lying at Deal, Broadstairs, and Birchington; and the first mention that occurs of it is as follows: "Grosvenor, one of the proctors of this court, appeared on behalf of the Duchess Dowager of Dorset, executrix of the will of the late most noble Lionel, Duke of Dorset, late lord warden of the cinque ports, under the hand and seal of the said Duchess Dowager, being a renunciation of her right to the said whales; and consented, on behalf of the said Duchess Dowager of Dorset, that the same shall be condemned to the king." "Lane, on behalf of the Earl of Holderness, consenting, the said five whales were decreed to belong, and are condemned, to our sovereign lord the king as perquisites belonging to his Majesty in his office of admiralty of England," &c.

Undoubtedly, in this instance, the condemnation passed to the king in his office of admiralty; but it is to be observed, that the decision was entirely *sub silentio*; that the Duke of Dorset, the lord warden, had died during the proceedings, and that his widow, in her capacity of executrix, renounced any right he might have had to this perquisite; there was no argument on the point, and no other decision than that which resulted from a compromise between the litigant parties. These cases therefore furnish no decided authority on which I can safely rely, nor any precedent to guide me to a sound legal conclusion.

Under a choice of cases, this is one of the last that I should have wished to decide, as it relates to the jurisdiction of the court over which I preside; but other courts have been placed under [\* 447] similar circumstances, and obliged to entertain \* questions respecting their own jurisdiction; and I have labored in vain to discover any special ground on which I could claim exemption from exercising my judgment on this matter.

From the best consideration that I have been able to give to all the facts and circumstances connected with the claim, I have brought my own mind to a conviction, that the right is in the Lord Warden; and it is a great satisfaction to me to reflect, that, if my judgment be erroneous, it may, and I trust will, be corrected by reference to another tribunal, of which some of the judges of the common law must necessarily form a component part.

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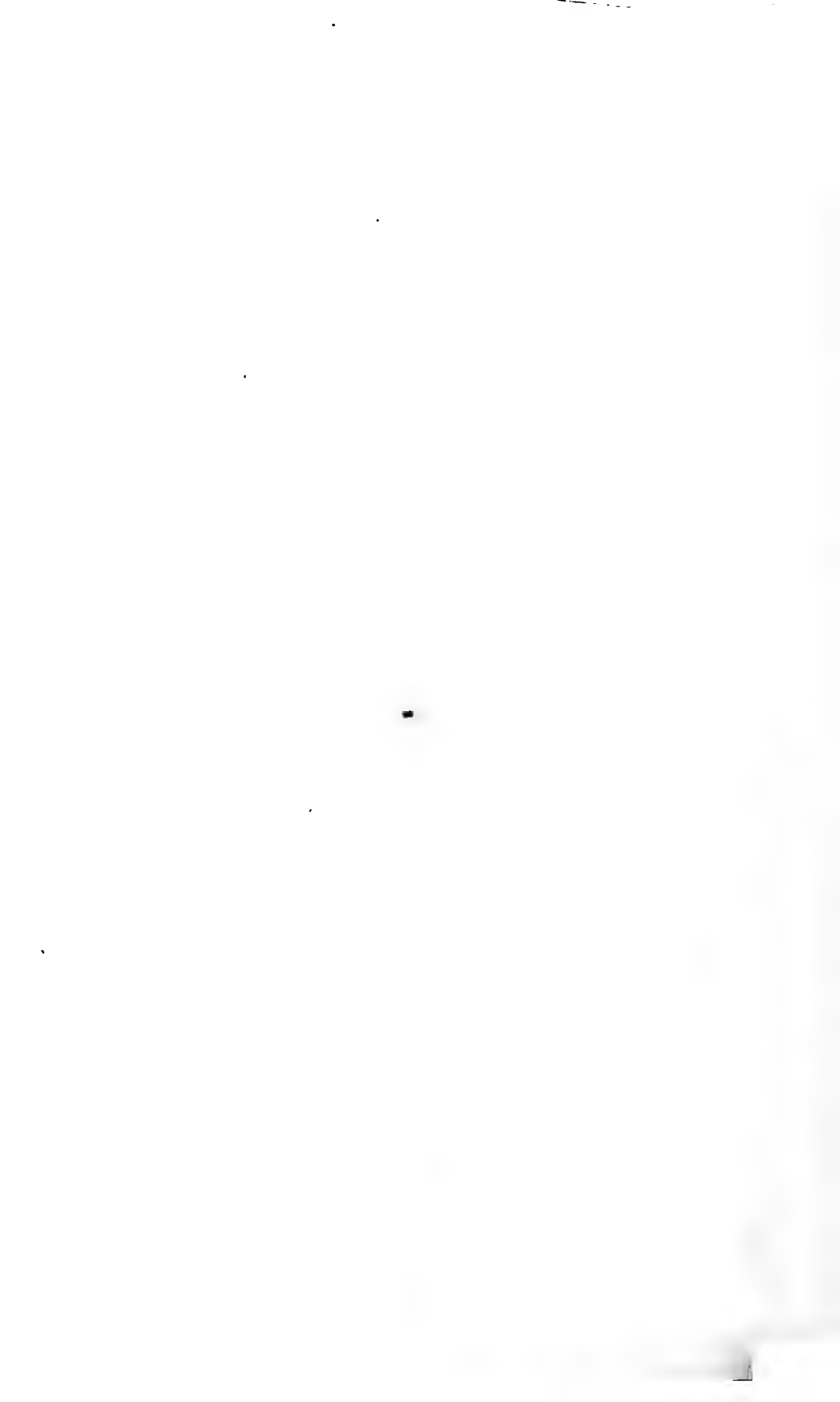
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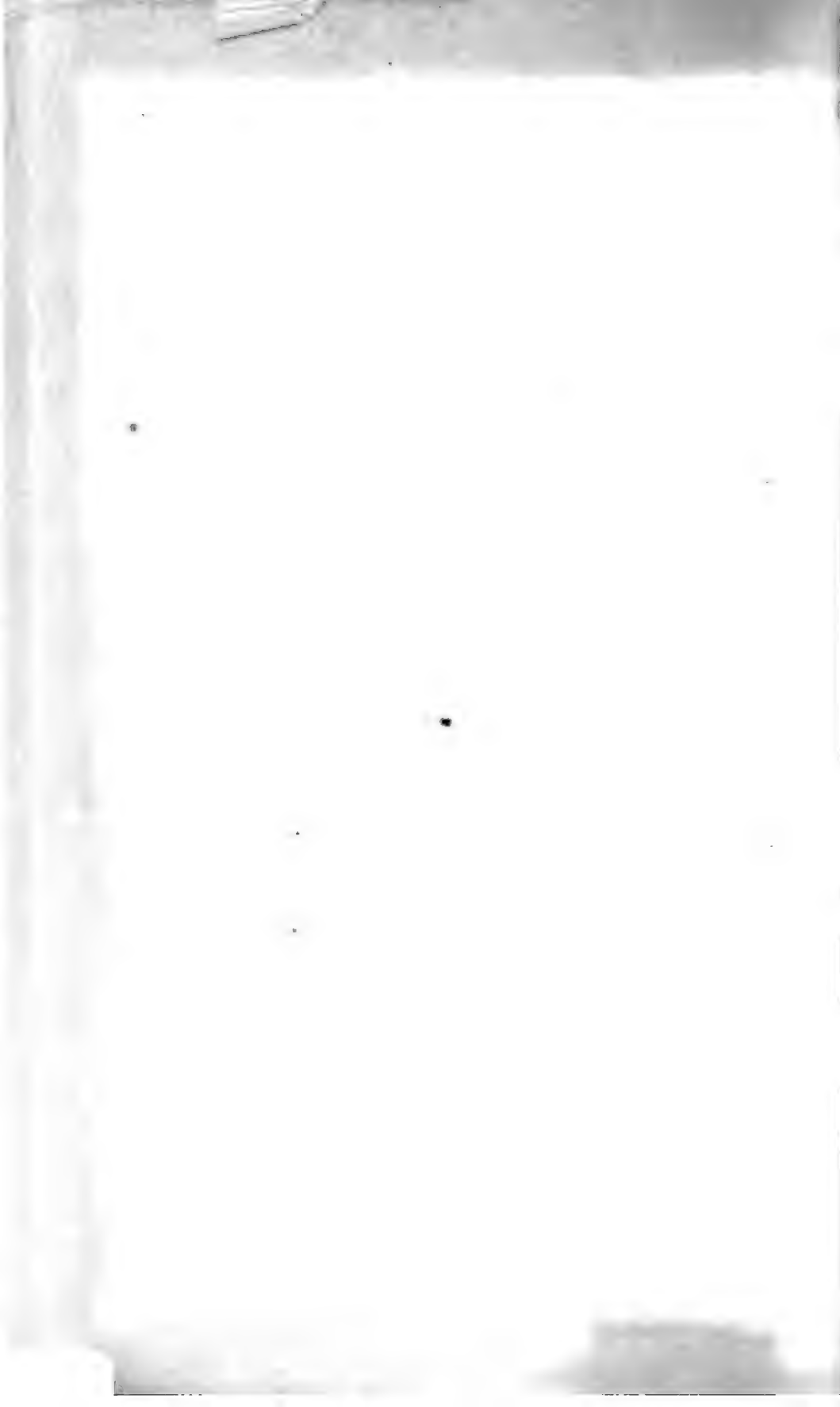
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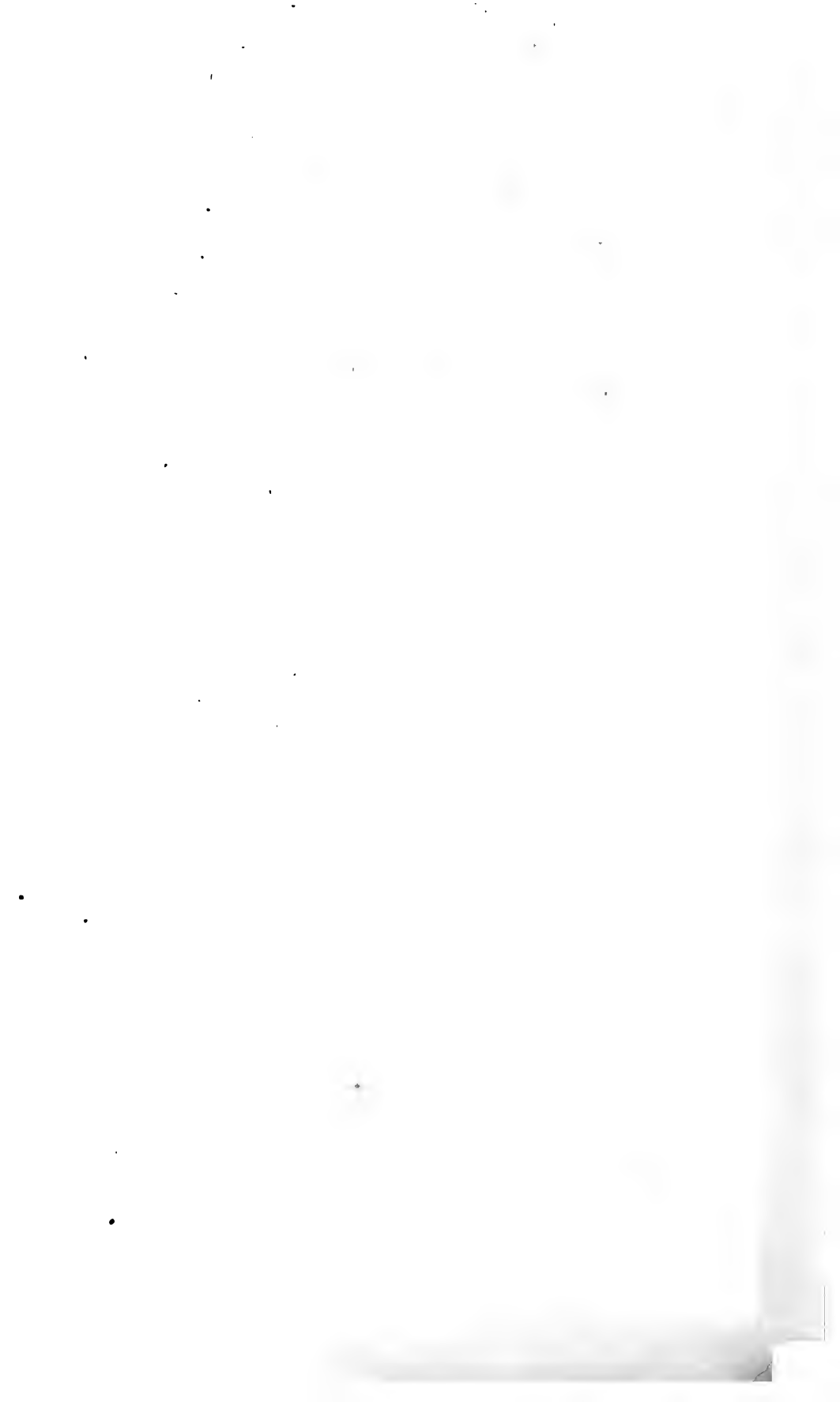
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